TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 109.

THE INDIANAPOLIS AND SAINT LOUIS RAILROAD COMPANY

vs.

HENRY HORST, PLAINTIFF IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 10, 1874.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and seventy-four, before the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex officio one of the judges of said circuit court for said district.

HENRY HORST
v.
THE INDIANAPOLIS AND ST. LOUIS RAILROAD Company. } Assumpsit. 2851.

Be it remembered that heretofore, to wit, on the 31st day of July, A. D. 1872, the plaintiff, by Mess. Porter, Harrison & Hines, his attorneys, filed in the office of the clerk of said court his declaration in the above-entitled cause, which reads in the words and figures following, to wit:

1st par. Henry Horst, a citizen of the State of Pennsylvania, complains of the Indianapolis and Saint Louis Railroad Company, a corporation organized and existing under the laws of the State of Indi-
2 ana, and a citizen of the said State of Indiana, and says, that before and at the time of the committing of the grievances hereinafter mentioned the defendant was the owner and proprietor of a certain railway, to wit, the Indianapolis and Saint Louis Railroad, and of certain carriages used by them for the carriage and conveyance of cattle and other live stock, and of the persons owning or having charge of the same, in, upon, and along said railway, from Saint Louis, in the State of Missouri, to Indianapolis, in the State of Indiana, and in and upon other railways to Pittsburgh, in the State of Pennsylvania, for hire and reward to the defendant in that behalf; that thereupon the plaintiff heretofore, to wit, on the third day of August, 1872, at the request of the defendant, shipped six car-loads of cattle upon said road at Saint Louis aforesaid, in cars provided therefor by the defendant, to be by the defendant carried and conveyed on the defendant's said road and other roads connecting therewith from Saint Louis aforesaid to Indianapolis aforesaid, and thence to Pittsburgh, in the State of Pennsylvania, for reward to the defendant in that behalf; and to enable the plaintiff to have proper oversight and charge of said cattle, the plaintiff, in consideration of the reward aforesaid, became a passenger on said train, to be by the defendant safely and securely carried along with the said cattle as a drover to
3 Pittsburgh aforesaid. The plaintiff further says, that it then and there became the duty of the defendant to provide and maintain a suitable car or other means of conveyance of the plaintiff on said train along with his said cattle, and to use due and proper care that the plaintiff should be safely and securely carried on the defendant's road; that accordingly a caboose or dover's car was attached to said train at Saint Louis, upon which the plaintiff was carried and conveyed from Saint Louis to Mattoon, in the State of Illinois; that said train and caboose arrived at Mattoon near midnight, to wit, about one o'clock in the morning, to wit, on the fourth day of August, A. D. 1872, when the plaintiff was informed by the conductor of said train that he was going to detach the caboose and leave it at Mattoon; and said conductor commanded the plaintiff to remove from said caboose and get upon the top or deck of one of the cattle-cars of the train; whereupon, there being no other way to go along with the said train than to mount the deck of one of the cattle-cars of the train, the defendant did get up on the roof of one

of such cars to be thus carried to the point, to wit, about one mile distant, where another caboose was to be attached to the train; and, while being thus carried and conveyed, by and through the car'lessness, negligence, and improper conduct of the defendant's servants in that
4 behalf, and without fault on the part of the plaintiff, said train was run or backed with great violence against said car or other obstruction to the plaintiff unknown, and in consequence of the concussion thereof, and from the insecure position which the plaintiff occupied by reason of having been compelled to be so carried and conveyed on the roof of one of the cars belonging to said train, the plaintiff was suddenly precipitated from the place that he was occupying on said roof, and thrown and cast with great violence from the top of the said car and upon the coupling between them, and the tendons of his right ankle were torn and lacerated, and the bones thereof broken and displaced, and said ankle otherwise bruised and injured. By reason whereof the plaintiff was unable further to pursue his journey on said train, and was obliged to pay a large sum, to wit, $20, for passage to Pittsburgh on another train; and plaintiff became and was for a long time sick, and suffered great pain and affliction, and was injured so as to be unable to walk except by the aid of a crutch, and has become a cripple for life; and he was obliged to, and did, expend a large sum of money, to wit, about the sum of one hundred dollars, for surgical and other treatment and attendance in attempting to cure himself. And the plaintiff says that, at the time of the happening of the said grievances, he was, and had been
5 for a long time before, to wit, eight years, a cattle-drover, and the owner of a farm, upon which he lived, and that by reason of the happening of said grievances he was prevented for a long space of time, to wit, ten months, from pursuing his occupation as such drover, and from exercising any oversight of his said farm, and can never hereafter exercise his business as a drover or farmer with the ability, vigor, and profit that he otherwise might and could have done.

2d par. And for a second paragraph the plaintiff, further complaining, says, that before and at the time of the committing of the other grievances hereinafter mentioned, the defendant was the owner and proprietor of a certain railway, to wit, the Indianapolis and Saint Louis Railroad, and of certain carriages used by the defendant for the conveyance and carriage of cattle and other live stock, and of the persons owning or having charge of the same, in, upon, and along said railway, from Saint Louis, in the State of Missouri, to Indianapolis, in the State of Indiana, and in and upon other railways to Pittsburgh, in the State of Pennsylvania, for hire and reward to the defendant in that behalf; that thereupon the plaintiff heretofore, to wit, on the third day of August, 1872, at the request of the defendant shipped six car-loads of cattle upon said road at Saint Louis aforesaid, on cars provided therefor by the de-
6 fendant, to be by the defendant, carried and conveyed on the defendant's said road and other roads connecting therewith from Saint Louis aforesaid to Indianapolis aforesaid, and thence to Pittsburgh, in the State of Pennsylvania, for reward to the defendant in that behalf; and to enable the plaintiff to have proper oversight and charge of said cattle, the plaintiff, in consideration of the reward aforesaid, became a passenger on said train, to be by the defendant safely and securely carried along with said cattle as a drover to Pittsburgh aforesaid. The plaintiff further says that it then and there became the duty of the defendant to provide and maintain a suitable car or other means of conveyance for the carriage and conveyance of the plaintiff on said train along with his said cattle, and to use due and proper care that plaintiff should be safely and securely carried on the defendant's road; but the

plaintiff says that the defendant did not provide and maintain drover's car or other suitable car or means of conveyance for the carriage and conveyance of the plaintiff on said train, in consequence of which neglect on the part of the defendant the plaintiff was compelled to
7 ride and be carried and conveyed on the roof of the cattle-cars composing said train; and while being so carried and conveyed on the roof of one of said cattle-cars, by and through the car'lessness and negligence and improper conduct of the defendant's servants in that behalf, and without fault on the part of the plaintiff, said train was run or backed with great violence against some car or other obstruction to the plaintiff unknown, and in consequence of the concussion therefrom, and from the insecure position which the plaintiff occupied by reason of having been compelled to be so carried and conveyed on the roof of one of the cars belonging to said train, the plaintiff was suddenly precipitated from the place that he was occupying on said roof, and was cast and thrown with great violence from the top of the said car between it and an adjacent car, and upon the coupling between them, and the tendons of his right ankle were torn and lacerated, and the bones thereof broken and displaced, and said ankle otherwise bruised and injured. By reason whereof the plaintiff was unable further to pursue his journey on said train, and was obliged to pay a large sum, to wit, $20, for railroad passage to Pittsburgh aforesaid on another train, and became and was for a long time sick and suffered great pain and affliction, and was injured so as to be unable to
8 walk except by the aid of a crutch, and has become a cripple for life; and he was obliged to, and did, expend a large sum, to wit, about the sum of one hundred dollars, for surgical and other treatment and attendance in attempting to cure himself. And the plaintiff says that at the time of the happening of the said grievances he was, and had been for a long time before, to wit, eight years, a cattle-drover, and the owner of a farm, upon which he lived, and that, by reason of the happening of said grievances, he was prevented, for a long space of time, to wit, ten months, from pursuing his occupation as such drover and from exercising any oversight of his said farm, and can never hereafter exercise his business as a drover or farmer with the ability, vigor, and profit that he otherwise might and could have done.

Wherefore plaintiff demands judgment in the sum of ten thousand dollars.

PORTER, HARRISON & HINES,
For Plff.

And afterwards, to wit, on the 4th day of December, A. D. 1872, at the November term of said court, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by counsel, and, upon his motion, the defendant is ruled to answer on or before the 6th instant.

9 And afterwards, to wit, on the 9th day of May, A. D. 1873, at the May term of said court, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by his attorneys, and, upon his motion, the defendant is ruled to answer by Monday next.

And afterwards, to wit, on the 13th day of May, A. D. 1873, at the term last aforesaid, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Mess. Dye & Harris, its attorneys, and files its answer herein in the words and figures following, to wit:

I. For answer to the complaint of plaintiff, the defendant denies each and every allegation thereof.

II. For further answer, the defendant says that on the 3d day of August, 1872, at the instance and request of plaintiff, the defendant issued to plaintiff a free pass or ticket, authorising plaintiff to travel or pass over defendant's railroad free of charge, upon the express condition and in consideration of the agreement that plaintiff would assume all risks of damage or injury to his person, and release the company from all responsibility for any damage or injury happening to him under any circumstances whatever, while using such free pass. Such free pass was accepted upon the condition and agreement above set forth. The injuries alleged in the complaint happened to plaintiff while he was traveling or being carried in the cars of the defendant over said railroad upon such free pass, issued to and accepted by him upon the condition and agreement above set forth.

Wherefore defendant prays judgment.

OSBORN,
DYE & HARRIS.

III. For further answer, the defendant says: On the 3d day of August, A. D. 1872, the plaintiff shipped six car-loads of cattle over defendant's railroad, to be carried in freight or stock cars from the city of St. Louis, in the State of Missouri, to the city of Indianapolis, in the State of Indiana, and thence by other railroads to their point of destination. At the time of shipping said cattle the plaintiff well knew that the risk and danger of traveling on freight or stock trains was far greater than on the passenger-trains of defendant; and plaintiff well knew that defendant had provided passenger-trains, running at convenient hours every day, to and from all points on her road, and that no passengers were carried by said defendant in stock or freight trains over her railroad, nor in any other than passenger-trains, provided exclusively for carrying passengers, unless such persons would assume the risk of, and release the company from all responsibility for, any damages or injury happening to such person while traveling on such stock or freight trains; and plaintiff well knew that, by the rules and regulations of such company, a pass or ticket to travel over her road upon freight or stock trains would only be issued upon the condition that the person receiving the same should assume all risk of harm or injury while upon such stock or freight train. And with such knowledge plaintiff requested and solicited a free pass to go upon the train with said stock from the city of Saint Louis to the city of Indianapolis; and the defendant issued to him a stock-drover's free pass, of which the following is a copy, to wit:

Countersigned by ——, *Agent.*

INDIANAPOLIS AND SAINT LOUIS RAILROAD.

Stock-drover's free pass.

EAST ST. LOUIS STATION, *August*, 1872.

Pass Henry Horst from East St. Louis to Indianapolis, Ind. On account of stock in cars No.———.

☞ The conductor will take up this pass.

This pass is good only on the train with the stock, and the person accepting it releases the company from all responsibility of loss or damage to the stock by suffocation, trampling, or injury to each other while in transportation, and agrees not to hold the company liable for any damage or injury to his person or property under any circumstances whatever.

JOHN C. NOYES,
Genl. Frt. Agent.

And the plaintiff received and accepted the same upon the terms and conditions therein expressed, paying no fare or reward to said company for such pass. And while traveling upon and using such pass upon the stock or freight train of defendant, the injuries alleged in the complaint happened to him.

Wherefore deft. prays judgt.

OSBORN AND
DYE & HARRIS,
For Deft.

IV. The defendant says the injury complained by plaintiff was caused by his own negligence.

OSBORN,
DYE & HARRIS.

And upon its motion the plaintiff is ruled to reply.

And afterwards, to wit, on the 26th day of May, A. D. 1873, at the term last aforesaid, before the honorable Thomas Drummond and
13 the honorable Walter Q. Gresham, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and by their consent it is ordered that this cause be, and the same is hereby, continued.

And afterwards, to wit, on the 5th day of November, A. D. 1873, at the November term of said court, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Mess. Porter, Harrison and Hines, his attorneys, and files his demurrer to the 2d and 3d paragraphs of the answer herein, in the words following, to wit:

The plaintiff demurs to the second and third paragraphs, respectively, of the defendant's answer, and says that neither of said paragraphs states facts sufficient to constitute a defense to the plaintiff's action.

PORTER, HARRISON & HINES,
Attys. for Plff.

And afterwards, to wit, on the 6th day of November, A. D. 1873, at the term last aforesaid, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Mess. Osborn, and Dye and Har-
14 ris, its attorneys, and files a fifth paragraph to its answer herein, in the words following, to wit:

Par. 5th. Further answering, deft. says, that on the day and at the time of the plaintiff's injury, *or* in the complaint set forth, it was, and still is, operating and running a railroad between East St. Louis, Illinois, and Indianapolis, Indiana, and engaged in carrying passengers and freight over said line; that on said day, plaintiff desired defendant to carry car-loads of live cattle from East St. Louis to Indianapolis for hire, which it agreed to do, and then and there received said cattle & undertook to carry the same by the ordinary manner and course of shipment to the point aforesaid; that by the rules and regulations of said company then existing, of which plaintiff then had full knowledge, all passengers were carried on certain trains passing over said line,

called passenger-trains, and that no freight was carried on said trains, and that all freight shipped over said line was carried in other trains known as freight and stock trains, on which no passengers were permitted to ride or be carried, on account of the increased risk and danger of personal injury incident to such trains; that, with this knowledge, plaintiff asked permission of the officers of deft. at St. Louis to ride on the freight-train carrying his said stock from
15 thence to Indianapolis, when he was informed, & then & there well knew that he could ride on said train only on the express condition that he would assume all risk of personal injury to himself, and release the defendant from all liability whatever for all personal injuries he might sustain while on said train by reason of the car'lessness or negligence of the employees of defendant while running said train from thence to Indianapolis, and that said company would not take or receive from him any fare or compensation for carrying him on said train from thence to Indianapolis; that with this knowledge, he then and there solicited from the officers of said company a free-pass ticket containing the said terms and conditions, a copy whereof is filed with and made a part of this paragraph, marked "Exhibit A," which said free-pass ticket was then issued to the plaintiff, and accepted by him with full knowledge of the terms and conditions therein contained, and well knowing on what conditions the same was issued, and then and there agreeing thereto; that under and by virtue thereof he was by the employees of said defendant permitted to enter and ride upon the said freight and stock train carrying his said cattle from the said place of shipment to Indianapolis; that while thereon, and while said train was being drawn from said point to Indianapolis by deft.'s locomotive, under control and management of her servants and employees,
16 who were competent and skillful persons for and in said duty and business, and while said contract set forth was in full force and unrevoked, the accident named in the complaint occurred, and plaintiff sustained the injuries complained of, which were not caused by any defect in the machinery or cars in said train, nor by any defect in the track or road-bed of said road, and without any actual intent on the part of the employees and servants running said train to inflict any injury upon the plaintiff; and defendant says it was carrying plaintiff on said train, under said free-pass ticket, gratuitously, and without any consideration-money to it whatever for so carrying the plaintiff, and that said pass has never been taken up by, or surrendered to, the defendant; and it further says that the plaintiff could have passed over said line on said day in a passenger-train leaving East St. Louis, after his said cattle had been loaded on the cars of deft., and arrived in Indianapolis before said freight-train would have arrived, and could have thus been present in due time to have received said cattle, of all of which plaintiff had full notice and well knew; and he further knew that said cattle could not and would not be unloaded or fed at any point on said line between the points named, and it denies the allegations of the complaint not herein admitted.

17 Wherefore defendant says that the plaintiff has no cause of action against it.

OSBORN &
DYE & HARRIS.

EXHIBIT A.

Indianapolis and Saint Louis Railroad.

Stock-drover's free pass.

EAST ST. LOUIS STATION, *Aug.* ——, 1872.

Pass Henry Horst from East St. Louis to Indianapolis on account of stock in cars No. ——. The conductor will take up this pass.

This pass is good only on the train with the stock, and the person accepting it releases the company from all responsibility of loss or damage to the stock by suffocation, trampling, or injury to each other while in transportation, and agrees not to hold the company liable for any damage or injury to his person or property under any circumstances whatever.

JOHN C. NOYES,
Gen'l Frt. Agent.

And the plaintiff also comes, by Mess. Porter, Harrison, and Hines, his attorneys, and files his demurrer to said 5th paragraph in the words following, to wit:

The plaintiff demurs to the 5th paragraph of the answer, and says that said paragraph does not state facts sufficient to constitute a defense to the plaintiff's action.

PORTER, HARRISON & HINES,
Attys. for Pl'ff.

18 And the defendant joining in demurrer, the same is now argued and submitted to the court. And the defendant, by its said counsel, now files its motion in writing to suppress certain of the depositions herein; and the court being sufficiently advised, doth now overrule said motion.

And afterwards, to wit, on the 11th day of November, A. D. 1873, at the term last aforesaid, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit: Come now the parties, by their respective attorneys, and the court being sufficiently advised doth now sustain the demurrers to the 2d and 3d and 5th paragraphs of the answer herein; to which ruling of the court the defendant now excepts. And the plaintiff, by Mess. Porter, Harrison, and Hines, his attorneys, now files his reply to the 4th paragraph of the answer herein in the words following, to wit:

The said plaintiff, for reply to the 4th paragraph of the answer of the defendant to the complaint of said plaintiff, denies each and every allegation thereof; and of this he puts himself upon the country.

PORTER, HARRISON & HINES,
Attorneys for Plaintiff.

19 And this cause coming on to be tried, here comes a jury, to wit: John W. Keeley, S. B. George, Thomas L. Ewing, Jeremiah Hawes, James H. Snell, Russell Hollister, J. D. Sater, Nicholas Howard, W. W. Catlin, Cyrus T. Nixon, Thomas W. Phillips, and Benjamin Dean, who, being duly empanneled and sworn, and having heard the evidence herein, are allowed by the court to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, on the 12th day of November, A. D. 1873, at the term last aforesaid, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and the jury heretofore empanneled and sworn in this cause also comes, and having heard the argument of counsel and the charge of the court, now retire to their room to consider of their verdict herein.

And afterwards, to wit, on the 13th day of November, A. D. 1873, at the term last aforesaid, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the jury heretofore empanneled and sworn also comes and returns into court the verdict following:

We, the jury, find for the plaintiff, and assess his damages at
20 the sum of eight thousand dollars, ($8,000.)

And afterwards, to wit, on the 18th day of November, A. D. 1874, at the term last aforesaid, before the honorable judge last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Mess. Osborn and Dye and Harris, its attorneys, and files its motion and reasons for a new trial herein in the words following, to wit:

The defendant, The Indianapolis & St. Louis Railroad Company, moves the court to grant a new trial in this case for the following reasons, to wit:

1. The verdict of the jury is contrary to law.

2. The verdict of the jury is contrary to the evidence, and is not supported by sufficient evidence.

3. The court erred in refusing to give and charge the jury the written instructions and charges asked by the defendant, numbered No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, to which refusal the defendant at the proper time and in the proper manner duly excepted.

4. The court erred in charging and giving to the jury the written instructions and charges asked by plaintiff and given by the court, especially charges and instructions No. 1, 2, 3, 4, 5, 6, and each and
21 every instruction and charge given by the court to the jury.

5. The court erred in charging the jury that "the burden of proving contributory negligence of the plaintiff rested upon the defendant, and it will not avail the defendant, unless it has been established by a preponderance of evidence," because such charge is not the law, and is misleading, and mislead the jury by causing them to ignore the proof of contributory negligence introduced by plaintiff.

6. The court erred in the 2d instruction given and charged, because the same is not the law, and is not applicable to the facts of the present case, and is calculated to mislead the jury.

7. The court erred in the 3d instruction charged given & to the jury, because the same is not the law, and is not applicable to the facts of the present case, and because said charge makes no distinction between the degree of diligence required of persons riding on freight-trains not provided for the conveyance of passengers and passengers carried on the regular passenger-trains of said company.

8. The 4th instruction given by the court is not the law, and not applicable to the facts as proved.

9. The court erred in the 5th instruction given to the jury, because

(1) the said charge submits to the jury as a question of fact to
22 determine what is the duty of the defendant to drovers accompanying their cattle on the freight-trains of the defendant; (2) because said charge submits this question as to the duty of defendant to provide cabooses for drovers accompanying their cattle to be determined by the jury by their belief or opinion, and not by their belief based upon evidence in the cause, and because such instruction is not the law as applicable to this case, & was calculated to mislead the jury, & does not define the degree of diligence required of plaintiff.

10. The 6th instruction given by the court is not the law.

11. The court erred in permitting Henry Horst to testify over defendant's objection as to the conduct and custom of defendant in changing cabooses or drovers' cars at Mattoon, Illinois, since and subsequent to the time of the happening of the injury alleged in the declaration, to which ruling of the court the defendant at the time excepted.

12. The court erred in refusing to instruct the jury on the written request of defendant, that in the event they should find a general verdict they should find specially upon particular questions of fact involved in the issues and stated in writing according to the forms, practice, & mode of proceedure at the time existing & in full force in the State of Indiana in the courts of record of said State.

23 13. The damages are excessive.

For all of which reasons we respectfully ask the court to grant a new trial in this case.

MILTON A. OSBORN,
DYE & HARRIS,
For Deft. The Ind'p'l's & St. Louis R. R. Co.

And afterwards, to wit, on the 1st day of June, A. D. 1874, at the May term of said court, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and the court, being sufficiently advised in this behalf, doth now overrule the motion of the defendant for a new trial.

It is therefore considered by the court that the plaintiff do recover of the defendant the said sum of eight thousand dollars ($8,000.00) so as aforesaid assessed and found, together with his costs and charges in this behalf laid out and expended, taxed at $——.

Whereupon the defendant files its bill of exceptions, in the words and figures following, to wit:

Be it remembered that on the trial of the above-named cause of Henry Horst v. The Indianapolis & St. Louis Railroad Company, in the United States circuit court in and for the district of Indiana, held at
24 Indianapolis, at the November term of said court for the year 1873, on the days of said term, to wit, on 11th and 12th days of November, A. D. 1873, the plaintiff, to sustain the issues joined, introduced the following testimony, to wit:

The depositions of John Parsley, Charles Nuss, Rachel Morris, Lorenzo B. Morris, and Dr. L. L. Todd, which were as follows, to wit:

Depositions of John Parsley & Charles W. Nuss, witnesses produced and sworn *to* before me, Martin L. Fowler, a notary public within and for Carroll County, Missouri, on the 31st day of October, 1872, pursuant to the enclosed notice. These depositions are taken on the part of the plaintiff in a certain cause now depending in the circuit

court of the United States for the district of Indiana, wherein Henry Horst is plaintiff and The Indianapolis & St. Louis Railroad Company is defendant.

The said JOHN PARSLEY, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Examined by Wm. M. Eads, of the firm of Hale & Eads:

1st Q. Where do you reside?

Ans. I reside at Caloma, Carroll County, Mo.

2d Q. How long have you resided here?

Ans. I have resided here 23 years last August.

25 3d Q. In what business were you engaged about the month of August, 1870?

4*th* Ans. I was engaged in the mercantile business, and also in buying & shipping stock.

5th Q. State where you were about the 3d or fourth of August, 1870.

Ans. Somewhere about that time I was at Mattoon, Illinois.

6th Q. What business were you in at Mattoon, Illinois?

Ans. I was then shipping stock from St. Louis to Pittsburg, Penn.

7th Q. By what mode, if any, did you ship stock from Mattoon, Ills., to Pittsburg?

Ans. By railroad; on the Indianapolis & St. Louis Railroad. I shipped from St. Louis by way of Mattoon over that railroad to Pittsburg.

8th Q. State whether or not you are acquainted with Henry Horst, the plaintiff in this case.

Ans. I am acquainted with him.

9th Q. State when & where you first became acquainted with him.

Ans. I first became acquainted with him at the depot at East St. Louis at the time I made the trip over the railroad aforesaid.

10th Q. State whether or not Mr. Horst, the pl*ft.*, accompanied you on that trip.

11th Q. State what, if anything, the plaintiff was having shipped over that road at the time.

26 Ans. He had five car-loads of stock, which he was shipping at the time.

12th Q. State whether or not yourself & the plaintiff in this case accompanied the train of cars upon which said stock were loaded, & which train of cars started out from East St. Louis; and, if so, what, if anything, occurred on said railroad.

Ans. We did accompany said train of cars, myself & the plaintiff, in a caboose attached to said train, until we reached Mattoon, Illinois. When we got to Mattoon, Ills., we changed cabooses by order or direction of the conductor of the train.

13th Q. State what directions the conductor, if any, gave to you & the plaintiff in this case in regard to changing cabooses.

Ans. The conductor told the plaintiff & myself to get out of the caboose in which we were at the time, & to get on top of the cars which contained our stock & the other freight, & the train would run down & hitch on to another caboose. We did get out of the caboose & got on to the top of the cars, as directed by the conductor.

14 Q. State what movement, if any, was made by the train after the plaintiff & yourself got on top of the cars.

Ans. It was in the night; the train ran down the track, I should judge,

between half and three-quarters of a mile. They then switched
27 off and backed up to catch on to the other caboose. In backing up to the caboose they lacked some little space of backing up close enough to hitch on, & the train then came to a stand-still. They aimed to push back again. I mean the engineer. From the revolutions of the engine or noise the train made & the smoke, I think they had about all the steam on they could get, and they could not push the train back. He then pulled up & catched slack on the train. When he catched the slack, I judge they put on all the steam they had. The train came back with all the power it had. It was about as hard a shock as I ever felt not to knock a train of' the track. It seemed like it was tearing everything to pieces.

15th Q. State what effect, if any, the jar had on you and the plaintiff in this case.

Ans. When the jar occurred, I had a big water-melon in my arms, & I lost it; it fell out of my arms. It was about all I could do to stay up there myself. The first I could think of noticing, after I dropped the melon, was hearing this man, the plaintiff, hollow. He was within two or three feet of me at the time the jar occurred, on the same car, and it knocked him off right between the two cars. I heard him making the noise, & I thought at the time it was Charles Nuss had fallen off, but I looked around & saw Charles Nuss going down the ladder on the side of the car.

28 16th Q. What injuries, if any, did you ascertain the plaintiff in this case had sustained by the fall?

Ans. The train had stopped to a stand-still. I went down the ladder on the side of the car after Charles Nuss. When I got down off the cars Charles had pulled the plaintiff out from between the cars, or at least he had hold of him. He had got him from between the cars, & he was laying about four or six feet from the cars when I got to him. The conductor hollows out, "Get this man into the caboose; the train is going to start out immediately." Myself & Charles Nuss & one brakesman picked him up & put him into the caboose. He, the plaintiff, was all the time complaining, & said his leg was broken. There was nothing more transpired at the time. The train started in a few minutes. After the train started, I looked to see how bad he was hurt. He, plaintiff, took his knife & split the side of his boot-leg down to his foot. Charles Nuss then lifted the book off. His leg was badly bruised all around his ankle. We thought it might be a sprain, & commenced applying cold water on it. We could not tell whether it was a sprain or break. We kept that up until we got to Paris. I don't know whether Paris is in Illinois or Indiana. I think Paris is in Illinois. It was in the night-
29 time, and we would have put him off sooner, but we saw no one up with whom we could leave him. He was put off the train at Paris. That was the first place we could see any one. The section-hands then put him on a hand-car, & started off with him. I saw him no more until the Sunday following, when I saw him at East Liberty, Pennsylvania.

17 Q. State in what condition he was when you saw him on the Sunday following.

Ans. He came across from the depot to a hotel. He had crutches, & his son was assisting him to get along.

18th Q. State whether or not the plaintiff in this case was able to go with his cattle through to Pittsburg.

Ans. I don't think he was.

19th Q. State who, if any one, took charge of his cattle.

Ans. Charles Nuss & I kept them up as well as we could. The plaintiff gave us instructions to turn them over to Holmes, Lafferty & Co. when we got to Pittsburgh. Berry was to sell the cattle for him.

20th Q. When, where, & upon what road did the above accident occur?

Ans. At Mattoon, Illinois, on or about the 4th of August. I can't tell exactly the date—it was about that time—in the year 1870. It was on the Indianapolis & St. Louis Railroad.

30 Cross-examined by M. A. Osborne, atty. for deft.:

21 Q. State whether Mr. Horst was a passenger on the train or not.

Ans. He had five car-loads of stock on the train, & was passing the same as I was.

22 Q. How much did you pay in fare over the road that trip, & how much did Mr. Horst pay?

Ans. I don't know how much I paid for my fare. I think I paid one hundred & ten dollars for two cars for my stock from East St. Louis to Pittsburgh. I don't know whether they counted my fare in or not.

23 Q. Would not the freight on the stock to Pittsburgh have been the same if you had not gone along?

Ans. I do not know.

24 Q. Did you have any pass over the road?

Ans. Yes, sir; I had.

25 Q. Have you that pass with you? If not, give its contents.

Ans. I have not the pass with me. The contents were about this—I can't tell it verbatim—"Conductor will pass bearer in charge of two car-loads of stock from St. Louis to Indianapolis."

26 Q. How do you know that Mr. Horst was passed on the train without charge?

Ans. All I know is what he told me about it.

27 Q. Do you not know that he was not a passenger paying
31 passenger-fare, but was on the train to took after and attend to his stock?

Ans. That was my understanding.

28 Q. Was there any other person or persons on board that train paying fare as passengers at the time of the accident or before? If so, who were they; where did they get off the train?

Ans. I don't recollect of any one being on the train but us three.

29 Q. What was the conductor's name on that train?

Ans. I do not know.

30 Q. Did you see & hear the conductor of that train tell Mr. Horst to get on top of the cars?

Ans. He included all. He did not speak to one more than the others.

31 Q. Are you certain that Mr. Horst was in the caboose at the time the conductor notified you that the train would move to another part of the yard for another caboose?

Ans. He was.

32 Q. Did he go directly with you & get on top of the cars?

Ans. Charles & I went up together, while he went forward to look after his cattle. In the mean time, before they ran down there, he came back to us on top of the cars about the time the train started.

33 Q. Do you know where all he went to while he was gone to look after his cattle?

Ans. He could not have gone more than the length of nine cars & back while he was gone.

32 34 Q. Was you personally with Mr. Horst all the time after you left East St. Louis until the time Horst left you to go forward to see his cattle?

Ans. Yes; all the time except the few minutes he went to see his cattle.

35 Q. How many brakemen & other employees of the railroad were on that train, & what were their names?

Ans. I don't know how many; neither do I know their names.

36 Q. Had you up to that time traveled much on freight-trains?

Ans. I have been to St. Louis several trips from this point.

37 Q. How did you travel? On top the cars or in the caboose?

Ans. The greater portion of the time in the caboose, sometimes on top the cars.

38. Q. Did you see any physician at Paris, Illinois?

Ans. I did not.

39 Q. What day of the week did you leave him at Paris?

Ans. I can't tell.

40 Q. Was the train in motion when Mr. Horst got on top the cars?

Ans. I don't hardly believe it had moved. If it had, it had barely started.

41 Q. At what time did Horst give you the melon, & when did he get it?

33 Ans. I can't tell you; it was in the evening about four o'clock; we passed a station, & he bought it from some boys standing there with a wagon-load.

42 Q. Did Mr. Horst make any other purchases that day?

Ans. Not that I know of.

43 Q. Had the train stopped still before you went down on the ladder.

Ans. Yes, sir.

44 Q. How do you know that CHARLES NUSS took Horst out from between the cars, if it was so dark you could not see?

Ans. The conductor came up with a lantern. I looked down & saw Horst between the cars & saw Nuss have hold of him.

Re-examined by W. M. Eads, atty. for plft.:

45 Q. State, if you please, what time elapsed between the time Horst got on top of the cars & the time of the accident.

Ans. I presume it was as much as ten or fifteen minutes. It was long enough for them to run down & back up again.

JOHN PARSLEY.

Subscribed and sworn to before me, the undersigned, notary public within and for Carroll County, Missouri, on the day, at the place, and between the hours in that behalf aforesaid.

34 Witness my hand and notarial seal this Oct. 31st, 1872.

[SEAL.] MARTIN L. FOWLER,
Notary Public.

And the said second witness, CHARLES NUSS, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Examined by Mr. Eads, atty. for plft.:

46 Q. State what is your name, age, residence, & occupation.

Ans. My name is Charles W. Nuss; my age is twenty-six years; I reside near Caloma, in Carroll County, Mo.; I am a farmer & stock-raiser.

47 Q. Where were you on or about the 4th of August, 1870?

Ans. Somewhere between East St. Louis & Mattoon, Illinois. We left East St. Louis on the 4th & got to Mattoon, Ills., about 12 o'clock at night, I think.

48 Q. Over what railroad, if any, were you traveling?

Ans. The Indianapolis & St. Louis R. R.

49 Q. State who, if any one, was in company with you, & what, if anything, you or they were transporting over the road.

Ans. Mr. Horst & Mr. Parsley were with me. Mr. Horst had five car-loads of cattle; Mr. Parsley had two car-loads, & I had two
35 car-loads. We were traveling on a freight-train & traveled to Mattoon in a caboose attached to the freight-train.

50 Q. What change, if any, was made in your mode of travel at or near Mattoon, & at whose instance was the change made, if any?

Ans. We were changed from the interior of the caboose to the top of the stock-cars, by order of the conductor.

51 Q. State what, if anything, the conductor said in regard to said change.

Ans. He ordered us to get on top of the stock-cars, as he was going to change cabooses at that place, & we would have to go a short distance before we came to the other caboose.

52 Q. State whether or not you and the plaintiff made the change in accordance with the directions of the conductor.

Ans. Mr. Horst & I ran forward to examine our stock & then climbed up on top of the cars right by our stock, & walked back on top of the cars until we got to the car next to the last, where we came to Mr. Parsley. We remained standing there until we come to the other caboose.

53 Q. State what, if any, movement was made by the train after you & the plaintiff got up on the cars which contained your stock.

Ans. The train started forward & ran some time, could not say just the distance. They then backed up on a side-switch to hitch on
36 to the caboose, but did not get quite close enough to hitch, & were obliged to start the engine forward & back up again, which caused a jar. Mr. Horst was standing nearest the division between the two cars, & fell between them & lodged on the coupling.

54 Q. State what injuries, if any, were received by the plaintiff by that fall and who assisted him in getting out from between the cars.

Ans. As the jar took place I noticed Mr. Horst fall. I climbed down the ladder on the corner of the car as quick as possible & found Mr. Horst right on the coupling between the two cars, and I grabbed hold of him & carried him out from between the cars & laid him down on the side of the track. By that time John Parsley had gotten down, & the conductor called for us to bring that man into the caboose as quick as possible. With Mr. Parsley's assistance we put plaintiff in the caboose. His foot was very badly bruised. It was his left foot, & he was in great pain during the remainder of the night. His foot turned black & blue just below the ankle on the side of the foot and also just above the heel behind. In order to give him ease, Mr. Parsley & I poured cold water on his foot. We thought the foot or ankle was broke, because the least pressure on the toe would cause him to groan.

37 55 Q. State what became of him after he received this injury.

Ans. He was put in the caboose, & the train proceeded on. A little after daylight we reached Paris, Illinois. There were some employees of the road there with a hand-car. Two of them carried Mr. Horst from the caboose to the hand-car, & the last I saw of him they were going on the back track with him on the hand-car. I next saw him on

the next Sunday at East Liberty, Pennsylvania. When I first saw him at East Liberty he was in the hotel. His foot was bundled up lying on a chair. He did not move around any that I saw. He had his crutches there with him, and his son attended to his business for him. He seemed to be suffering at the time, & was not able to put his crippled foot to the ground.

56 Q. At the time that the plaintiff was knocked off of the top of the cars state whether or not the jar made by the cars was a moderate or violent jar.

Ans. It was quite a severe jar.

57 Q. State whether or not you experienced any difficulty in holding on yourself.

Ans. The jar caused me to stagger, but being farther from the division between the cars than Mr. Horst no accident happened to me.

58 Q. State whether or not there was anything on the top of
38 those cars to hold on to; and, if so, what was it?

Ans. There was nothing except the board we walked on; by sitting down we could get our fingers under the edge of the board.

59 Q. At what time did this accident occur?

Ans. It was near twelve o'clock at night.

60 Q. State what change, if any, was made of conductors at Mattoon.

Ans. We changed conductors.

61 Q. State which of the conductors ordered you to get out of the caboose and to get on top of the cars; whether it was the conductor that took you from St. Louis, or whether it was the one that got on at Mattoon.

Ans. It was the one that took us from St. Louis. The accident occurred just as we were about to couple on to the other caboose, & the new conductor ordered us to put him, the plft., into that caboose.

Cross-examined by M. A. Osborne:

62 Q. Did you & Mr. Horst at the time you climbed on to the top of the cars know that the train would be backed down to hitch on to a caboose?

Ans. I knew they were going to hitch on to a caboose. I did not know they were going to back down.

63 Q. Why did you get on to the cars at that place instead of going back to the rear of the train?

39 Ans. We were afraid that the train might start & we could not be able to get on to it.

64 Q. Had the train commenced backing before you stopped on the car next to the last?

Ans. No, sir; the train had not moved.

65 Q. How long afterwards until it commenced moving?

Ans. It was a very short time after we got back there when the train moved backward.

66 Q. How near to the end of the car did Horst stand?

Ans. I think he stood about six or seven feet from the end of the car.

67 Q. If Horst had been sitting on the foot-plank on top of the car or on top of the car itself at the time of the jar, would he have fallen?

Ans. I can't say as to that.

68 Q. If Horst had been sitting at the center on top of the cars, would he then have fallen at the time of the jar?

Ans. If he had hold of the foot-board, I don't think he would.

69 Q. How was it that neither you nor Parsley fell off when Horst did?

Ans. One reason was, we stood farther away from the end, &, being younger men, were more active.

70 Q. Did not Horst know at the time he was standing up on top the car near its end that the train was backing to hitch on to a caboose?

Ans. I think he did. He knew we were backing, I suppose. We were told that they were going to take on another caboose.

CHAS. W. NUSS.

Subscribed and sworn to before me, the undersigned, notary public within and for Carroll County, Missouri, on the day, at the place, and between the hours in that behalf first aforesaid.

Witness my hand and notarial seal this Oct. 31st, 1872.

[SEAL.] MARTIN L. FOWLER,
Notary Public.

STATE OF MO.,
Carroll County:

I, Martin L. Fowler, a notary public within and for said county, hereby certify that the above John Parsley & Charles W. Nuss were by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that their depositions were reduced to writing by me; that the said Indianapolis & St. Louis Railroad Company, the defendant, attended by M. A. Osborne, esqr., their attorney, and said depositions were taken at the law-office of Hale & Eads, at Carrollton, in the county of Carroll and State of Missouri, on the 31st day of Oct., 1872, between the hours of eight o'clock a. m. & six o'clock p. m. of said day.

41 In testimony whereof I hereto set my hand and notarial seal this the 31st day of October, A. D. 1872.

[SEAL.] MARTIN L. FOWLER,
Notary Public.

Depositions of Rachel Morris, Lorenzo D. Morris, and L. L. Todd, witnesses produced and sworn to before me, a notary public of Edgar County, at Paris, in Edgar County, State of Illinois, on the twenty-second day of April, A. D. 1873, pursuant to the enclosed notice. This deposition was taken on the part of the plaintiff in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein Henry Horst is plaintiff and the Indianapolis and St. Louis Railroad Company is defendant.

The said RACHEL MORRIS, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Examined by Seller & Dole, atty. for plff.:

Question first. State your name, age, and residence.

Answer. My name is Rachel Morris; my age is fifty-seven years; my residence is Edgar County, Illinois.

Question second. State if you are acquainted with Henry Horst; if yes, when and where did you become acquainted with him? State all you know of him fully.

42 Answer. Some time in the month of August, 1870, some persons carried him into our house, where we were keeping hotel in

Paris, Illinois. He was hurt; his ankle and heel was bruised and seemed badly mashed; he seemed to suffer greatly. I fixed him in bed, and bathed his ankle and worked with him under the direction of Doctor Todd. He required attention all the time he was there, both night and day. He was there under our care three or four days; then he despatched to his son, and his son came and took him away. They furnished him with a pair of crutches before he could go to the depot.

her
RACHEL + MORRIS.
mark.

Attest:
GEO. DOLE,
C. V. JAQUIETH.

The said LORENZO D. MORRIS, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Question first. State your name, age, and your place of residence in August, A. D. 1870.

Answer. My name is Lorenzo D. Morris; my age is fifty-nine years; my place of residence in August, 1870, was Paris, Illinois.

Question 2d. State if you are acquainted with Henry Horst. If yes, state when you become acquainted with him, where and how you
43 became acquainted with him; state all the circumstances of your acquaintance with him fully.

Answer. Some time in the month of August, A. D. 1870, some railroad men carried him into my house, where I was then keeping hotel, in Paris, Illinois. I then went for a physician, and brought Doctor Todd. Mr. Horst's ankle and heel seemed to be badly hurt; it was bruised badly and swollen. He staid at my house some three or four days; he required attention all the time he was at my house. I attended to him some, but my wife attended to him more than I did during the time he staid at the hotel. Under the direction of Horst, I took a despatch to the telegraph-office for his son. His son afterwards came and took Mr. Horst away. I procured a pair of crutches for him before he went away, and by the aid of them he walked to the depot. When he first came to my house, and during all the time he staid there, he seemed to suffer great pain.

L. D. MORRIS.

The said L. L. TODD, being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

State your name, age, place of residence, and occupation.

My name is Levi L. Todd; my age is forty-two years; my place of residence is Paris, Edgar County, Illinois; my occupation, physician and surgeon.

44 Question second. State if you are acquainted with the plaintiff in this *so*. If so, when did you become acquainted with him?

Answer. I am acquainted with him. I became acquainted with him some time in the summer of 1870.

Question third. State if you ever treated the plaintiff, Henry Horst, profession'ly. If so, state where, and under what circumstances.

Answer. I did. I was called to see Mr. Horst at the Globe House, in this city, and found him suffering with a severe injury of the left ankle-joint, which I supposed to be a severe contusion, but might

have been a fracture possibly of the lower portion of the tibia, or of the bone that forms the lower portion of the articulation. The parts were much swollen and very painful, so that I could not make a certain diagnosis of the case from the appearance of the ankle when I first saw it. I judged it might have been several days since the injury had been received. I think I attended the plaintiff about three days. My judgment of the case at the time I treated it was that the injury was permanent, and I told him as much. My examination of to-day only confirms me in that view of the case.

L. L. TODD, *M. D.*

STATE OF ILLINOIS,
Edgar County, ss:

I, John B. Hannah, a notary public

45 *State of Illinois,*
Edgar County, ss:

I, John B. Hannah, a notary public within and for said county, hereby certify that the above Rachel Morris, Lorenzo D. Morris, and Levi L. Todd were by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that their depositions were reduced to writing by me; that the Indianapolis and St. Louis Railroad Company, attended by Cyrus V. Jaquith, attorney; and said depositions were taken at the post-office in Paris, in the County of Edgar, State of Illinois, on the twenty-second day of April, A. D. 1873, between the hours of eight o'clock a. m. and five o'clock p. m. of said day.

In testimony whereof I have hereunto set my hand and notarial seal this twenty-second day of April, A. D. 1873.

[SEAL.] JOHN B. HANNAH, *N. P.*

HENRY HORST, plaintiff, testified as follows:

I reside in Dauphin County, Penn. I am a cattle-drover and farmer, and live four miles from town, and own several small tracts near where I live; also a farm. I have been engaged in cattle-trade since 1862. I dealt some in cattle and mules before that time.

Question. To what extent have you been engaged in buying and selling cattle?

46 (Objected to by defendant's attorney. Objection overruled, and exception reserved.)

Answered as follows: Have been shipping most of the time since 1862, up to the time I was hurt; frequently was at home two weeks at a time. I shipped, say, 1,000 head a year, from time to time; since I was hurt not so many, because I can't get around so well. This accident occurred on 4th of August, 1870. I shipped 5 cars of cattle from St. Louis to Pittsburgh—98 cattle, in 5 cars—and was with them at time of accident. Left East St. Louis at about 3 o'clock afternoon on the 3rd of August. It was about midnight when we arrived at Mattoon. We were carried in a caboose on hind end of train. I had laid down to sleep; conductor roused us up. Parsley and Nuss (two other drovers) and I got out. I had a carpet-sack and cattle-prod 5½ feet long. The conductor ordered us out of the caboose, and to get on top of train. He said we would run down a certain distance and hitch on another caboose. I handed my carpet-sack to Parsley and Nuss, and I went forward to my cattle, which were next to engine. I then got on top of cars, as I was ordered, and went back on train to where Parsley was. He asked me to take my satchel, which I did. I rested on my prod as a brace. No one was on the

back car, as near as I can judge, at this time. I had my satchel in my left hand, and my prod in my right. The train ran up one-half or three-
47 fourths miles and then backed in to take on a caboose. We were standing on top of the train. The caboose is generally attached to hind end of train. Before they got clear down a brakeman got on the last car. Brakeman was there to make connection with caboose. By this time they had got to caboose. The train slacked up. Brakeman was on last car with a light. I thought he was on same car I was. I might have seen, if I had had a chance. They didn't get quite up; they pulled forward and took up slack so as to push back and make the connection with the caboose. It was dark between me and brakeman on hind car. I had satchel in my left hand and prod in my right. I thought I was on same car with brakeman. I tried to prop myself from falling, and fell between the cars. I might have known, if I had thought, that I was not on same car with brakeman. I was thrown down and sorely hurt; my side and elbow were hurt some. I was awfully scared. I think conductor called for men to pull me out. I thought my leg was smashed all to pieces. They put me in the caboose. I cut my boot-leg and took my boot off, and they put ice-water on my leg. They had a keg of ice-water in the car, and kept applying it till daylight. At daylight I arrived at Paris, Ill. The conductor came and asked me if I would get off. I told him I would to get a doctor.
48 Then conductor turned to two drovers and said bring him off. At this time we were 200 yards from hotel. Conductor spoke to some employees and told them to carry down to hotel. They went for a hand-car and took me up to hotel. As soon as I got there I sent for the best doctor, and the landlord went for Doctor Todd. His landlady had me put to bed. I sent a despatch to my son at Mishawaka, and told him to come on. He came. I suffered great pain day any night. I got there Thursday and left Saturday, 3 p. m. Went to train on crutches, with my son helping me. I went on to East Liberty. I got to Pittsburg by the aid of crutches, and my son and Berry had the cattle sold. I couldn't get out till after cattle were sold and settled for. I used cruthes for nearly six months; didn't do any business of any consequence for a year. Did not go after any stock for eleven months. Couldn't do any work. When I wanted to go to my farm, had to use a horse and buggy. It was difficult to get in. This injury affects me so that I have never been a day without pain. My foot is so tender I can't walk on it easily over uneven surfaces or when barefoot. Have to wear a laced boot as a support. Can only move my ankle or foot slightly; can't walk on uneven surfaces easily; have to use a cane in walking. I paid
49 Dr. Todd five dollars for services. When cars together they came with a very severe jar. I was 50 years old on the 21st of last May.

P. H. JAMESON testified as follows:

I have resided in Indianapolis 30 years; have been practicing medicine about 25 years; have practiced surgery some, medicine more. I have examined the foot and leg of plaintiff; ankle is badly used up; can only use it a little; has no power over foot; nearly as bad as a wooden leg. The bones are ½ inch farther apart than they should be. There must have been a fracture; appearance the same as all fractures about the joint are; always worse than fracture of a simple bone. It would be a simple matter compared with this. The bone is crooked; parts are grown or glued together. Nerves of the foot are permanently injured. Think no treatment could make it better. Dr. Todd has a good character as a physician.

HENRY HORST cross-examined:

I had been west trading and dealing in cattle; have been in the same business since 1862. Mr. Anderson came over to the cattle-yards and asked who were going to ship cattle; he is the stock-agent of the company at St. Louis. I asked what was the rate. He said $65 to Pittsburgh. Sometimes the rates vary. I made no contract; only asked what are the rates, and said I wanted the railroad to ship as cheap
50 as any one else. He said he couldn't ship for any less than $65 per car, and I shipped. (The plaintiff was here shown a pass.) Witness continued as follows: I had a pass like this when I was hurt. I can't see any difference.

Indianapolis and Saint Louis Railroad.—Stock drover's free pass.

E. ST. LOUIS STATION, *July* 18, 1872.

Pass Henry Horst from East St. Louis to Indianapolis on account of stock in cars No. 5 cars cattle. This pass is good only on the train with the stock, and the person accepting it releases the company from all responsibility of loss or damage to the stock by suffocation, trampling, or injury to each other while in transportation, and agrees not to hold the company liable for any damage or injury to his person or property under any circumstances whatever. The conductor will take up this pass.

JOHN C. NOYES,
Gen'l Frt. Agent.

Countersigned by—
GEO. W. WASSON.

I think I gave the pass I had to the conductor when I got on the train at Paris, and I explained the matter to him, and he carried me to Indianapolis on it. When I had shipped my stock, the agent said, now come and get your passes, and we got the passes and went on the train. The two other drovers had passes on the same train with me. There were no other persons traveling on the train but us drovers. I think
51 no one else had any stock on the train except myself and the two other drovers. I shipped stock in 1872 over this road. I shipped in July, 1872. I had shipped stock over this road prior to August, 1870. I had been on passenger-trains also. Sometimes I rode on passenger-trains and sometimes on stock-trains with my stock. In going through Mattoon before August, 1870, on stock-trains, on which I was on with stock, they always changed cabooses, conductors, and engines there like they did this time. On this occasion I went forward to look after my cattle, and got on the cars at the front end of the train, and walked back to near the rear end on the top of the cars. It was not very dark. I had no lantern with me. Conductor said they would take on caboose at east end of the yard. They moved forward, and then went back to take on the other caboose. I had been over this road before with stock. Parsley was on top of next to the hind car, and when I came up he handed me my satchel. He had a water-melon in his arms. I don't know how many cars there were—more than the 9 stock-cars; there were other cars in the train; may have been 15 or 20 in all. It was a heavy train, as I judge by the way they were backing. I was on the car next to the last—near the west end. When they took up the slack, I heard them taking it up. I held the stick to support me like. I was on the west or hind end of the car. It was either
52 when the cars struck each other coming back or in the rebound

in making the connection that I stepped forward and fell down. They always rebound like, and I don't know which it was. A brakeman had a lantern and was between me and the end of the last car. I fell down with my left foot first and was thrown between the cars. The caboose was right at the end of the train. I think the distance was ½ or ¾ of a mile between where the cabooses were. Don't know how far the train backed after going on and leaving the 1st caboose. I think my face was rather sideways at the time I fell. I didn't apprehend any particular danger at the time. I had been on top of trains before.

Re-examined by plaintiff:

I have traveled with stock over this road since I was hurt.

Question by plaintiff's counsel. State whether since 1870 the company in changing cabooses at Mattoon do it in the same may as they did before that time.

(To this question the defendant's counsel objected, because the same was improper and irrelevant and did not tend to show any negligence on the part of the defendant on the occasion when the plaintiff was injured, which objection was overruled by the court, and to which ruling defendant at the time by counsel excepted in proper form and manner.)

53 Witness then answered: They do not do as they did; they now change cabooses at the same point.

And here the plaintiff rests his evidence.

M. A. OSBORN examined on part of the defendant.

I am now and for years have been the general attorney for the defendant. Since suit was brought I undertook to find the pass on which plaintiff was riding at the time of the accident. They are usually kept at auditor's office. I was not able to find the pass. I have been making search.

Cross-examination:

Auditor of the company has charge of the passes and showed me where the passes were kept; and a clerk went through all the passes there. It may not have been brought to his office; may have been destroyed in this accident. The only style of pass with which I am familiar, is like the one shown plaintiff.

Re-examination:

These passes were all kept in a drawer, and run back to July, 1870. These passes are taken up by conductors and are returned to the aduditor's office. I examined all the passes on file. I found the passes to Mr. Horst now in my hands. These are the only ones I found in search. Found only 2 forward passes, 4 return passes. I did not know, till Horst testified, that he had given his pass to a passenger conductor.

54 Havn't been able to find name of conductor, because I did not know ticket had been given to passenger conductor.

The pass shown plaintiff was hereupon read by the defendant.

HENRY HORST re-examined:

I do not know the name of conductor to whom I handed this pass. I gave the pass to a passenger conductor on the 6th day of August, 1870.

Cross-examination:

I can't say this pass is exactly like the one I had, for I always gave up a pass. I did not read the contents.

Which was all the evidence given in the cause.

The defendant then moved the court in writing on the evening of the day before the argument of said cause to instruct the jury, in the event they should find a general verdict, to find specifically upon certain questions of fact embraced in the issues, according to the practice and mode of proceeding then in force in said State of Indiana, which motion was as follows, to wit:

The defendant requests the court to instruct the jury, in the event they find a general verdict, to find specially on the questions of fact set forth in the following interrogatories.

OSBORN &
DYE & HARRIS,
For Deft.

55 1. At the time of the happening of the injury in the complaint described, was not plaintiff riding in the night when it was dark on the top of the cattle-car?

Answer.

2. Was there not a foot-board on the top of said car on which plaintiff could have sat down, and by holding on to which he could have prevented himself from falling from such car?

Answer.

3. Did not plaintiff know at the time of such injury that the train of cars upon which he was riding was about to be backed up on the switch for the purpose of attaching a caboose?

Answer.

4. Did plaintiff sit down on the foot-board or hold on to the same?

Answer.

5. Did not plaintiff stand up on the top of such cattle-car within six feet of the end of such car? If not, how near to the end of said car did plaintiff stand?

Answer.

6. Did plaintiff take any precautions to prevent his falling or being thrown from said car? If so, what precautions did he take?

Answer.

7. Did not plaintiff get on the top of said cattle-car when he knew the train was about to move?

56 Answer.

8. Did not the injuries alleged in the complaint result from his falling or being thrown from such car while standing on the top thereof?

Answer.

9. If the defendant was guilty of any negligence contributing to the injury of which plaintiff complains, state specifically in what acts or omissions such negligence consisted.

Answer.

And thereupon the court refused such written request, overruled such motion, and refused to instruct the jury to find specifically upon the questions of fact embraced in the above interrogatories. To the overruling of which motion and refusal of which request, and refusal to instruct the jury to make such special findings touching such questions of fact, the defendant at the time expected.

And then the defendant moved the court to give the jury the following written charge and instructions, which motion was made and which instructions were handed to the court in proper time & before the beginning of the argument of said cause, and which instructions asked by defendant are as follows, to wit:

The defendant requests the court to instruct the jury as follows:

1. Where a railroad company simply permits persons to take
57 passage on a freight or cattle train, not provided for passenger traffic, such persons cannot hold the company to the same degree of care and diligence that is due to passengers traveling on the regular passenger-trains of the company.

2. A person who takes passage on a freight or cattle train assumes the inconvenience and risk of danger incident to travel on a freight-train in the exercise of ordinary and reasonable diligence on the part of the railroad company to prevent accidents and injury.

3. A railroad company is only bound to use such care and diligence in the management of freight and cattle trains as is required in the exercise of ordinary and reasonable prudence to prevent injury to the cattle or freight transported on such trains and to employees and other persons who may be permitted accompany such freight or cattle trains.

4. Before the plaintiff can recover in this case he must establish, by a preponderance of evidence, that the alleged injury resulted from the want of ordinary care and diligence on the part of defendant or its agents in the running and management of the cattle or a freight train; and, also, that the plaintiff himself is not chargeable with any negligence or carelessness that contributed to produce the injury.

5. A person traveling on a freight or cattle train is bound to
58 exercise such care and take such precautions to avoid accident and injury to himself as a person of ordinary care and prudence would take when exposed to the same danger and under the same circumstances; and, if the jury believe from the evidence that the failure to take such care and exercise such precaution contributed in any degree to produce or cause the injury alleged in declaration, they will find for the defendant.

6. If the jury believe from the evidence that the plaintiff did any act which unnecessarily exposed him to the risk of the accident or injury of which he complains, he cannot recover in this action. (See Shearman & Redfield, § 281.)

7. If the jury believe from the evidence that the plaintiff was riding on the top of a freight or cattle car at the time the alleged injury occurred, in the night when it was dark, and that there was a foot-board on the top of such car on which plaintiff could have sat, and by holding on to which he could have prevented himself from being thrown from the car, and that plaintiff knew that the cars were being backed up on a switch for the purpose of attaching a caboose, and that one effort to back such cars up to such caboose had failed and that the engine had moved forward and was about to make another effort to back the cars up to the caboose, and that plaintiff did not sit down nor hold on to such foot-board, but stood within six feet of the end of the car, and
59 that he took no precautions to prevent his falling or being thrown from the top of the car, and that the fact that plaintiff did not sit down and hold on to the foot-board, and that he stood so near the end of car and took no precautions to avoid being thrown therefrom, contributed in any degree to cause the accident, they will find for the defendant.

8. If the jury believe from the evidence that, at the time the alleged injury occurred, the plaintiff was riding on the top of a freight or cattle car in the night-time, when it was dark, and that there was a foot-board on the top of such car, on which plaintiff could have sat, and by holding on to which he could have prevented himself from falling or being thrown from the car, and that plaintiff knew that the cars were being backed up on a switch for the purpose of attaching a caboose, and that

one effort to back such cars up to such caboose had failed, and that the engine had moved forward and was about to make another effort to back the train up to the caboose, and that plaintiff did not sit down nor hold on to such footboard, but stood up near the end of such car, and that he took no precautions to prevent his falling or being thrown from the top of the car, and that a person of ordinary prudence, in the same circumstances, exposed to the same danger, would have sat down or held
60 on to the footboard, or stood farther from the end of the car, or taken any other precautions to avoid falling or being thrown from the car, and that the failure of plaintiff to exercise such precautions contributed in any degree to produce the injury, they will find for the defendant.

9. If you find from the evidence that the plaintiff was shipping cattle over the defendant's railroad under a contract at an agreed price, to be paid for each car transported, and that the plaintiff, without paying anything additional for his own transportation, but for the sole purpose of taking care of his stock, which *it* was on the cars, asked and obtained permission from the deft. to go upon that particular train, upon the condition that he would claim nothing for any injury that might result to his person while on such freight-train, knowing it to be hazardous and dangerous to travel on such train, then the plaintiff cannot recover in this case, & your finding should be for the deft.

10. If you find from the evidence that the plaintiff went upon the freight-train of deft., knowing it to be a dangerous place to travel, and that he agreed with the deft. that he would claim no compensation for any danger or personal injury he might receive while so traveling, and that he paid nothing for, and the defendant made no charge & rec'd nothing for such transportation, then the plaintiff was not a pas-
61 senger for hire or pay, and the *the* plaintiff, in the absence of gross negligence on the part of the deft. & its servants, could not recover, and you should find for the deft.

11. If you find from the evidence that the plaintiff was standing up on top of a box or cattle car when the train was being backed up to hitch on to a caboose, when he might have sat down on the foot-board on top the car and been in less danger than when standing up, then the plaintiff was guilty of negligence, & your finding should be for deft.

12. If you find from the evidence that the plaintiff went on top the cars in the night-time, knowing at the time that the train was to be backed up to hitch on to a caboose, and that the train was heavy, and could be moved only by heavy strain, and would be backed up against the caboose, and that in moving the train there would necessarily be jarring and concussion by one car striking another, and that his injury was caused by such concussion and jarring of cars, then he could not recover, because he took the risk of the position.

13. If you find from the evidence that the plaintiff went on top of the cars, to be carried from one point to another, in the deft's car-yards, while the train was being backed up to hitch on to another car,
62 and that, while the train was so moving, the plaintiff stood up on top of a car, and was, by reason of his so standing up at the time of the movement of said train, thrown from the train & injured, when, if he had been sitting down at the center of said car, he would not have been injured, then your finding should be for the deft.

14. The negligence charged in the declaration against the deft. is, first, that the deft. failed to furnish a sufficient car in which to carry the plaintiff; and, second, that the servants of the deft. in charge of the train negligently backed the train against another car or other obstruc-

tion, with too much violence, and in such a negligent manner as to throw the plff. off of the car upon which he was at the time situated. Your investigations as to neglect will be confined to these charges only, because no others are alleged.

15. In determining the question as to whether the defendant furnished a sufficient car, you will take into consideration the kind of train the plaintiff was traveling upon and the nature of his business and employment, if any, on that particular train, and, if it was a freight-train, the kind of freight which was being carried on the train. The defendant is not, as a carrier of passengers, required to provide passenger-cars on freight-trains, which are used only for transportation of freight,
63 and if the plaintiff chose to go upon a freight-train, which had no passenger-car attached or connected with it, when the defendant was providing passenger-trains sufficient to carry him, and while on such freight-train received a personal injury on account of his insecure position on such freight-train, he cannot complain of the failure of the defendant to furnish a different kind of car.

16. In determining the question as to the negligence of the defendant's servants in the management of the train of cars upon which it is alleged the plaintiff was a passenger, you will consider the kind of train they had, and the kind of business they were doing, and the movements of the train at the time the alleged injury was done. The servants of the deft. in charge of freight-train would have the right to detach a caboose or any other car from the train, and leave it at Mattoon or any other point, & to take on another, and for this purpose might move the train forward or back it from the main track on to side-tracks, and if in doing so they used reasonable care in moving the train and in backing it up to hitch on another car, the plaintiff could not complain.

17. If you find from the evidence that the plaintiff was upon a freight-car, attached to a freight-train, at the time he received the injury complained of, you will, in determining the question as to negligence
64 of the deft's. servants in the management of the train, take into consideration the kind of train and the means used in starting and checking or stopping such trains. A freight-train made up of several freight-cars loaded with live stock cannot be managed the same as a passenger-train, and the defendant is not required to use the same degree of care in the movement of such trains as is required in the movement of a passenger-train, and such trains are not provided with the same means of moving & stopping them.

18. If you find from the evidence that the plaintiff, in the night-time, when it was dark, went up on top of a freight-car, when the train was in motion, and stood up on the top of & near the end of such car when it was being backed up to hitch on to another car, and that he knew at the time the train was being so backed up to hitch on to another car, and he might, instead of so standing up, have sit down at a less dangerous place, and the injury complained of resulted from a fall from the end of the car, and the place where he stood was insecure, or might have known it by reasonable diligence on his part, then the plaintiff was guilty of neglect, which contributed to his own injury, and your finding should be for the deft.

19. If the plff. went up on top of a freight-car when the train was about to move, and stood up on top of such freight-car, near the
65 front of the car, when it was being moved up to hitch on to another car, and received an injury by falling from such car during the movement of the train, he was guilty of negligence, and ought not to recover against deft.

20. Travellers on railway-trains are required to use reasonable care and precaution while on a train or car to avoid accident or injury, and it is no excuse for a passenger on a railroad-car, in taking a dangerous or insecure position on a car, that the conductor ordered or commanded him to take such position, if at the time he knew it to be insecure and dangerous.

And the court refused to give such instructions aforesaid asked by defendant; to which refusal the defendant excepted at the time in proper form and manner.

And the court then gave the following instructions asked by plaintiff—to the giving of the 1st, 2d, 3d, 4th, 5th, & 6th of which the plaintiff at the time excepted in proper form and manner—which instructions, given as aforesaid by the court & excepted to by defendant, are as follows, to wit:

It is alleged in the declaration, that the defendant was the owner of certain carriages used by the defendant for the purpose of the conveyance of cattle or other live stock, and of persons owning or having charge of the same along and upon the railroad of defendant; that plaintiff
66 shipped six car-loads of cattle on said road in cars provided therefor, to be carried over said road for reward to defendant, and to enable plaintiff to have a proper oversight and care of said cattle the plaintiff, in consideration of such reward, became a passenger on such train, to be carried by defendant, with said cattle, as a drover, to Pittsburg, Pa.; that a caboose or drover's car was attached to said train at St. Louis, on which plaintiff was carried or conveyed from St. Louis to Mattoon, Ill.; that the train arrived at Mattoon, Ill., about one o'clock at night, when the plaintiff was informed by the conductor of said train that he was going to detach said caboose and leave it at Mattoon, and was commanded by said conductor to remove from said caboose and get on top of one of the cattle-cars of said train; and the defendant did get on the top or deck of a cattle-car, and while being carried in this position to a point about one mile distant, where another caboose was to be attached to the train, by the negligence, carelessness, and improper conduct of defendant's servants, and without fault on the part of plaintiff, said train was run or backed with great violence against said car or other obstruction, and in consequence of the concussion thereof and from the insecure position which plaintiff occupied by reason of having
67 been compelled to be carried on the top of such car, he was suddenly thrown from the top of said car and injured.

The second count of the declaration differs from the first only by omitting the allegation that plaintiff was ordered by the conductor to get on the top of the freight-car, and in alleging that defendant did not provide a drover's car, or other suitable car or conveyance for the carriage and convenience of plaintiff on said train, and in consequence of such failure he was compelled to ride on the top of a freight-car. The allegations in reference to the manner in which the injury took place are the same as in the first paragraph. The defendant pleads two pleas, the general issue, and a special plea, alleging that the injury was occasioned by the negligence of the plaintiff, to which special plea the plaintiff replies in denial.

1. If the plaintiff has satisfied you by a preponderance of evidence, that he was injured as claimed, and that the injury was caused by the negligence of those operating the defendant's train of cars, then the plaintiff has made out his case and is entitled to a verdict, unless by his own want

of reasonable care he directly contributed to the accident. But the burden of proving contributory negligence of the plaintiff rests upon the defendant, and it will not avail the defendant, unless it has been
68 established by a preponderance of evidence.

Given & excepted to—Osborn & Dye & Harris.

2. It would not be enough to defeat a recovery in a case like the present, that the plaintiff's want of care might have contributed remotely to the injury, if the negligence of the defendant or her servants was the immediate cause of it, and if by the exercise of proper care or precaution the defendant might have prevented the injury.

Given & excepted to—Osborn for deft.

3. Where carriers undertake to carry persons by the powerful but dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence. If the defendant failed to exercise such a degree of care and diligence in the transportation of the plaintiff, and the want of the exercise of such care and diligence was the immediate cause of the injury he received, the plaintiff is entitled to recover, unless by want of reasonable care directly contributed to his injury.

Given & excepted to—Osborn for deft.

4. And it would make no difference in this case, that at the time the injury was received the pllaintiff was traveling upon a ticket, on which there was a printed stipulation, that by receiving and using it he agreed to exempt the company from any injury that might befall him by
69 reason of the negligence of the defendant or her servants. The company had no right to require from the plaintiff any such agreement, and its enforcement against the plaintiff would be contrary to public policy.

Given & excepted to—Osborn for deft.

5. If you believe that a proper provision for the safety of drovers accompanying their cattle on a train requires that a caboose or car shall be assigned to them, and that it would not be properly providing for their safety to compel them to ride upon the deck of the cattle or freight cars comprising the train, then you will have a right to consider, if such facts have been proved, whether or not it was a proper exercise of care on the part of the defendant or her servants on the occasion when the injury to the plaintiff is shown to have occurred to detach at midnight the caboose in which he was riding from the remainder of the train, for the purpose of attaching to the train a caboose at a point a half or three-quarters of a mile distant, and to require the defendant to climb upon the deck of one of the cars, to remain there until the train should run to where the new caboose was to be attached; and if you should find that these facts have been proved, and that this was not a proper provision for the plaintiff's safety, and that the injury was directly occasioned by such improper provision for his safety while he, the
70 plaintiff, was exercising reasonable care to avert danger, then you should find for the plaintiff.

Given & excepted to—Osborn, Dye & H. for deft.

6. If you should find for the plaintiff, you have a right, in estimating the pecuniary compensation which you shall award him, to consider the effect of the injury upon the past and future use of the injured limb; the bodily pain and suffering, if any, which he has already borne, and which the evidence has shown he is likely to suffer in future as the direct result of the injury received; also, the effect, if any, which the same has had and is likely to have in future on his ability to attend to his ordinary affairs; and, generally, what will compensate the plaintiff, so

far as a pecuniary provision can be made for the actual injury received through the negligent conduct of the defendant.

Given & excepted to—Osborn, Dye & H. for deft.

And thereupon the jury retired for deliberation and returned into court the following verdict, to wit: [Here insert.]

And thereupon the defendant, by counsel, filing the following motion and written reasons for a new trial, to wit: [Here insert.]

Which motion was overruled by the court; to which ruling of the court the defendant at the time excepted, and had leave to
71 file her bill of exceptions, which is done; and, being signed by the judge of this court, is made part of the record in this case.

Whereupon the court, upon plaintiff's motion, rendered judgment upon the verdict of the jury, to which the defendant, at the time excepted; and this bill of exceptions is now signed and sealed.

WALTER Q. GRESHAM,
Dist. Judge.

And the defendant prays its writ of error from the Supreme Court of the United States; which is allowed upon the filing of a proper bond in error in the penalty of twelve thousand dollars with surety satisfactory to the court.

And afterwards, to wit, on the 15th day of July, A. D. 1874, in recess of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant and submits its bond for appeal herein in the penalty of $12,000, with Edward King as surety thereon, which is approved by the judge of said court, and ordered to be filed.

[Here follows a copy of said bond.]

Supreme Court of the United States.

HENRY HORST, DEFENDANT IN ERROR,
vs.
INDIANAPOLIS AND ST. LOUIS RAILROAD Company, plaintiff in error.

72 Know all men by these presents that we, the Indianapolis and St. Louis Railroad Company, & Edward King, are held and firmly bound unto the above-named Henry Horst, and to his heirs, executors, administrators, and assigns, in the sum of twelve thousand dollars, to be paid to said Henry Horst; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators jointly by these presents, sealed with our seals and dated this 15 day of July, 1874.

Whereas the above-named Indianapolis & St. Louis Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that, if the above-named Indianapolis & St. Louis Railroad Company shall prosecute its said writ of error to effect, and answer all costs and damages that may

be adjudged or awarded *him* if *he* shall fail to make good *his* plea, then this obligation to be void; otherwise, in full force.

73 The Indianapolis and St. Louis Railroad Company,
By E. WOODWARD, *Prest.* [SEAL.]
EDWARD KING. [SEAL.]

Attest: E. KING, *Treas.*

Sealed and delivered in presence of—

Attest as to the signature of Edward King—
WM. A. BROWN.

Taken and approved by me this 15 day of July, 1874.
DAVID DAVIS, *Judge.*

74 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, John D. Howland, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of record of the above-entitled cause, as fully as the same is now of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Indianapolis, in said district, this 22d day of July, A. D. 1874.
[SEAL.] J. D. HOWLAND, *Clerk.*

75 UNITED STATES OF AMERICA, *ss:*

To Henry Horst, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of Indiana, wherein The Indianapolis and St. Louis Railroad Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in this behalf.

Witness the honorable David Davis, one of the justices of the Supreme Court of the United States, this 15 day of July, 1874.
DAVID DAVIS, *Judge.*

Service on following page.

76 DISTRICT OF INDIANA,
July 15th, 1874.

We, the counsel for said defendant in error, hereby acknowledge service of the foregoing citation.

PORTER, HARRISON, & HINES,
Attorneys for Henry Horst.

INDIANAPOLIS.

77 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court, before you, be-

tween The Indianapolis and St. Louis Railroad Company, plaintiff in error, and Henry Horst, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the 12th day of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, this 15th day of July, A. D. 1874.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsement on cover:) No. 109. The Indianapolis & St. Louis Railroad Company, plaintiff in error, vs. Henry Horst. Indiana C. C. U. S. Filed 10th October, 1874.

SUPREME COURT

OF THE UNITED STATES.

HENRY HORST,

v.

THE INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY.

ARGUMENT FOR I. & ST. L. R. R. CO.

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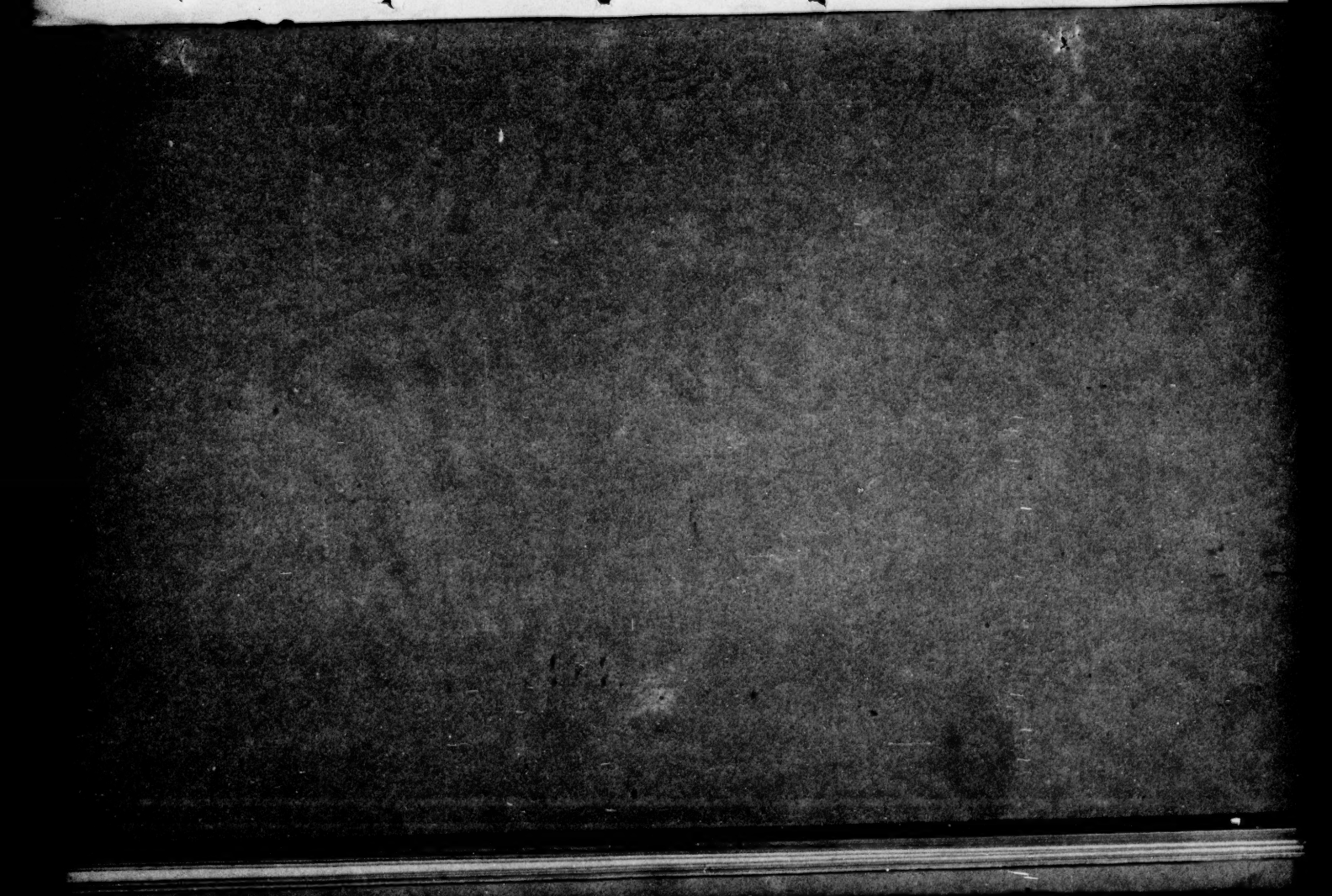

SUPREME COURT

OF THE UNITED STATES.

I. & ST. L. R. R. CO., *Plaintiff in Error,*

v.

HENRY HORST, *Defendant in Error.*

BRIEF FOR PLAINTIFF.

I. THE PLEADINGS.

The first paragraph of the declaration is as follows:

"FIRST PARAGRAPH.—Henry Horst, a citizen of the State of Pennsylvania, complains of the Indianapolis & St. Louis Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana, and a citizen of the said State of Indiana, and says that before and at the time of the committing of the grievances hereinafter mentioned, the defendant was the owner and proprietor of a certain railway, to-wit: the Indianapolis & St. Louis Railroad, and of certain carriages used by them for the conveyance of cattle and other live stock, and of the persons having charge of the same in, along and upon said railway, from St. Louis, in the

State of Missouri, to Indianapolis, in the State of Indiana, and in and upon other railways to Pittsburgh, in the State of Pennsylvania, for hire and reward to the defendants in that behalf; that thereupon the plaintiff heretofore, to-wit, on the third day of August, 1870, at the request of *the defendant, shipped six car loads of cattle* upon said road at St. Louis aforesaid, in cars provided therefor by the defendant, to be by the defendant carried and conveyed on defendant's said road, and other roads connecting therewith, from St. Louis aforesaid to Indianapolis aforesaid, and thence to Pittsburgh, in the State of Pennsylvania, *for reward to the defendant in that behalf; and to enable plaintiff to have proper oversight and charge of said cattle, the plaintiff, in consideration of the reward aforesaid, became a passenger on said train,* to be by the defendant safely carried along with said cattle as a drover, to Pittsburgh aforesaid; *and it then and there became the duty of defendant to provide and maintain a suitable car or other suitable means of conveyance of the plaintiff on said train, along with his said cattle, and to use due and proper care that the plaintiff should be safely and securely carried on the defendant's road;* that accordingly a caboose or drover's car was attached to said train at St. Louis, upon which the plaintiff was carried from St. Louis to Mattoon, in the State of Illinois; that said train and caboose arrived at Mattoon about midnight, to-wit, about one o'clock in the morning, to-wit, on the 4th day of August, 1860, when the plaintiff was informed by the conductor of said train tnat he was going to detach the caboose and leave it at Mattoon, and the said conductor commanded the plaintiff to remove from said caboose and get upon the top or deck of one of the cattle cars of the train, whereupon, there being no other way to go along with said train than to mount the deck of one of the cars of the train, the plaintiff did get upon the roof of one of such cars, to be thus carried to the point, to-wit, about one mile distant, where another caboose was to be attached to the train, and while being thus conveyed, by and through the carelessness, negligence and improper conduct of the defendant's servants in that behalf, and without fault on the part of the plaintiff, said train was run or backed with great violence against said car or other obstruction, to the plaintiff unknown, and in consequence of the concussion thereof, *and from the insecure position which the plaintiff occupied, by reason of having been compelled to be so carried and conveyed on the roof of one of the cars belonging to said train,* the plaintiff was suddenly precipitated from the place he was occupying on said roof, and thrown and cast with great violence from the top of the said car and upon the coupling between them, and the tendons of his right ankle

were torn and lacerated, and the bones thereof broken and displaced, and said ankle otherwise bruised and injured, by reason whereof the plaintiff was unable to further pursue his journey on said train and was obliged to pay a large sum of money, to-wit: $20, for passage to Pittsburgh on another train and plaintiff became and was for a long time sick, and suffered great pain and affliction, and was injured so as to be unable to walk except by the aid of a crutch, and has become a cripple for life, and he was obliged to and did expend a large sum of money, to-wit, about $100, for surgical and other treatment, in attempting to cure himself; and the plaintiff says that at the time of the happening of said grievance he was, and for a long time before, to-wit, eight years, a cattle drover, and the owner of a farm on which he lived, and that by reason of the happening of said grievance he was prevented for a long space of time, to-wit, ten months, from pursuing his occupation as such drover, and from exercising any oversight of his said farm, and can never after exercise his business as a farmer or drover with the ability, vigor and profit that he otherwise might and could have done."

The second paragraph of the declaration is like the first, except it omits the allegation that the plaintiff was commanded to get upon the top of the freight car by the conductor.

The 4th paragraph of the answer was as follows:

"Further answering, defendant says that on the day and at the time of the plaintiff's injury, as in the complaint set forth, it was and still is operating and running a railroad between East St. Louis, in the State of Illinois, and Indianapolis, Indiana, and engaged in carrying passengers and freight over said line. That on said day plaintiff desired defendant to carry a load of live cattle from East St. Louis to Indianapolis for him, which it agreed to do, and then and there received said cattle and undertook to carry the same by the ordinary manner and course of shipment to the point aforesaid. That by the rules and regulations of the said company then existing, of which plaintiff then had full knowledge, all passengers were carried on certain trains passing over said line, called passenger trains, and that all freight passing over said line was carried in the trains known as freight and stock trains, on which no passengers were permitted to ride or be carried, on ac-

count of the increased risk and danger of personal injury incident to such trains. That with this knowledge plaintiff asked permission of the officers of the defendant at St. Louis to ride on the freight train carrying his said stock from thence to Indianapolis, when he was informed, and then and there well knew, that he could ride on said train only on the express condition that he would assume all risk of personal injury to himself, and release the defendant from all liability whatever for all personal injuries he might sustain while on such train, by reason of the carelessness or negligence of the employes of defendant while running said train from thence to Indianapolis. And that said company would not take or receive of him any fare or compensation for carrying him on said train from thence to Indianapolis. That with this knowledge he solicited from the officers of said company a free pass ticket containing the same terms and conditions (a copy whereof is filed with and made a part of this paragraph, marked exhibit "A"), which free pass ticket was then issued to the plaintiff and accepted by him with full knowledge of the terms and conditions therein contained, and well knowing on what terms and conditions the same was issued, and then and there agreeing thereto. That under and by virtue thereof he was by the employes of said defendant permitted to enter and ride upon the said freight and stock train carrying his cattle from said place of shipment to Indianapolis. That while thereon and while said train was being drawn from such point to Indianapolis by defendant's locomotive, under the control and management of her servants and employes, who were competent and skillful persons for and in said duty and business, and when said contract set forth was in full force and unrevoked, the accident named in the complaint occurred, and plaintiff sustained the injuries complained of, which were not caused by any defect in the machinery or cars in said train, nor by any defect in the track or road-bed of said road, and without any actual intent on the part of the employes and servants running said train to inflict any injury upon the plaintiff. And defendant says it was carrying said plaintiff on said train gratuitously, and without any consideration whatever moving to it for so carrying the plaintiff, and that said pass has never been taken up and surrendered to the defendant. And it further says said plaintiff could have passed over said line on said day in a passenger train, leaving East St. Louis after his cattle had been loaded on the cars of defendant, and arrived in Indianapolis before said freight train could have arrived, and could thus have been present

in due time to receive said cattle, all of which plaintiff well knew. And he further knew that said cattle could not or would not be unloaded and fed at any point on said line between the points named. And it denies the allegations of the complaint not herein admitted.

"Wherefore defendant says that the plaintiff has no cause of action against it."

To this paragraph a demurrer was sustained by the Court.

II. THE ISSUES.

It is alleged in the declaration that,

1. Plaintiff was a passenger for hire or reward on the cars of the defendant;

2. That while being carried as a passenger for hire on defendant's train he was injured by the negligence of defendant; and,

3. That plaintiff was free from any negligence that contributed to the injury.

The answer in general denial put in issue these allegations.

III. THE EVIDENCE.

The following is an abstract of the evidence given by plaintiff to sustain these issues:

Henry Horst, the plaintiff, testified:

I am a cattle drover and farmer. * * I have been engaged in the cattle trade since 1862. The accident occurred on the 4th of August, 1870. I had been West, trading and dealing in cattle. Mr. Anderson, the stock agent of the Company at St. Louis, came over to the cattle yards and asked who were going to ship cattle. I asked what was the rate. He said $65 a car to Pittsburg.

Sometimes the rates vary. *I made no contract—only asked what are the rates, and said I wanted the railroad to ship as cheap for me as any one else. He said he could not ship for less than $65 a car, and I shipped.*

I had a pass like this when I was hurt; I can see no difference.

INDIANAPOLIS AND SAINT LOUIS RAILROAD.

STOCK DROVER'S FREE PASS.

E. St. Louis Station, July 18, 1872.

Pass Henry Horst from East St. Louis to Indianapolis, on account of stock in cars No. 5 cars cattle. This pass is good only on the train with the stock, and the person accepting it releases the Company from all responsibility of loss or damage to the stock by suffocation, trampling, or injury to each other while in transportation, and agrees not to hold the Company liable for any damage or injury to his person or property under any circumstances whatever.

☞ The conductor will take up this pass.

John C. Noyes,
Gen'l Frt. Ag't.

Countersigned by
Geo. W. Wasson.

The two other drovers had passes on the same train with me; there were no other persons traveling on the train but us drovers. I think no one else had any stock in the train but myself and the two other drovers. * * I had shipped stock over this road prior to August, 1870. I had been on passenger trains also. *Sometimes I rode on passenger and sometimes on stock trains with my stock. In going through Mattoon, prior to August, 1870, on stock trains with my stock, they always changed cabooses, conductors and engines there like they did this time.*

On this occasion I went forward to look after my cattle, and got on the cars on the front end of the train and

walked back to near the rear end on the top of the cars. I don't know how many cars there were; there were nine stock cars. There may have been fifteen or twenty in the train. It was a heavy train, as I judge by the way they were backing. I was on the car next to the last. *When they took up the slack I heard them taking it up. I didn't apprehend any particular danger at the time. I had been on top of trains before.* * * I had my prod in my left hand and my satchel in my right. A brakeman was on the last car with a light. *I thought he was on the same car I was. I might have known, if I had thought, that I was not on the same car with the brakeman.* * * * It was either when the cars struck each other coming back, or in the rebound in making the connection, *that I stepped forward and fell down.*

John Parsley testified:

"We—plaintiff and myself—rode in a caboose attached to said train till we reached Mattoon, Ill., when we changed cabooses, by order or direction of the conductor of the train. The conductor told us to get out of the caboose on which we were at the time, and to get up on top of the cars which contained our stock and the other freight, and the train would run down and hitch on to another caboose. We did get out of the caboose and get on the top of the cars as directed by the conductor. It was in the night—the train ran down the track I should judge between ½ and ¾ of a mile. *They then switched off and backed up to catch on to the other caboose. In backing up to the caboose they lacked some little space of backing up close enough to be hitched on, and the train then came to a stand-still. They*

aimed to push back again. From the revolutions of the engine, or noise the train made, and the smoke, I think they had about all the steam on they could get, and they could not push the train back. He then pulled up and catched the slack on the train. When he catched the slack I judge they put on all the steam they had. The train then came back with all the power it had. It was about as hard a shock as I ever felt not to knock a train off of the track. It seemed like it was tearing everything to pieces. When the jar occurred I had a big mellon in my arms, and I lost it. It fell out of my arms. It was about all I could do to stay up there myself. The first I can think of noticing after I dropped my mellon was hearing plaintiff halloo. He was within two or three feet of me at the time the jar occurred, on the same car, and it knocked him off right between the two cars."

Q. State whether Mr. Horst was a passenger on the train or not?

A. He had five car loads of stock on the train. He was passing the same as I was.

Q. Do you not know that he was not a passenger, paying passenger fare, but was on the train to look after and attend to his stock?

A. That was my understanding.

Q. Had you up to that time traveled much on freight trains?

A. I had been to St. Louis several trips from this point.

Q. How did you travel, on the top of the cars or in the caboose?

A. The greater portion of the time in the caboose, sometimes on top of the cars.

Charles Nuss, testified.

Mr. Horst and Mr. Parsley were with me. Mr. Horst had five car loads of cattle; Parsley had two car loads, and I had two car loads. We were traveling on a freight train, and traveled to Mattoon in a caboose attached to a freight train.

At Mattoon the conductor ordered us to get on top of the stock car, as we were going to change cabooses at that place, and we would have to go a short distance before we came to the other caboose. Mr. Horst and I ran forward to examine our stock, and then climbed on top of the cars right by our stock and walked back on the top of the cars until we got to the car next to the last, where we came to Mr. Parsley. We remained standing there till we came to the other caboose. The train started forward and ran sometime. I could not say just the distance. They then backed up on side track to hitch on caboose, but did not get quite close enough to hitch, and *were obliged* to start the engine forward and back up again, which caused a jar. Mr. Horst was standing nearest the division between the two cars, and fell between them and lodged on the coupling.

It was quite a severe jar. It caused me to stagger, but being farther from the division than Mr. Horst no accident happened me. There was nothing to hold to except the board we walked on. *By sitting down we could get our fingers under the edge of the board. If Mr. Horst had held on to the foot-board I don't think he would have fallen off.*

One reason Mr. Parsely and I did not fall off, was we stood farther away from the end of the car, and being younger men we were more active. I think Horst knew while standing near the end of the car, that the train was backing to hitch on the caboose. He knew we were backing, I suppose. We were told that they were going to take on another caboose.

IV. INSTRUCTIONS REFUSED.

The defendant asked the Court to give the following instructions, all of which the Court refused to give:

10 *a.* If you find by the evidence that the plaintiff went upon the freight train of defendant, knowing it to be a dangerous place to travel, and that he agreed with the defendant that he would claim no compensation for any damages or personal injury he might receive while so traveling, and that he paid nothing for, and the defendant made no charge and received nothing for such transportation, then the plaintiff was not a passenger for hire or pay, and the plaintiff, in the absence of gross negligence on the part of defendant or its servants, could not recover, and you should find for defendant.

1 *b.* 1. When a railway company simply permits persons to take passage on a freight or cattle train, not provided for passenger traffic, such persons can not hold the company to the same degree of care and diligence that is due to passengers traveling on the regular passenger trains of the company.

2 *c.* 2. A person who takes passage on a freight or cattle train of a railroad company assumes the inconvenience and risk of danger incident to travel on a freight train, in the exercise of ordinary and reasonable diligence on the part of the railroad company to prevent accidents or injury.

14 *d.* The negligence charged in the declaration against the defendant is, first, that the defendant failed to furnish a sufficient car in which to carry plaintiff, and, second, that the servants of the defendant in charge of the train negligently backed the train against another car, or other obstruction, with too much violence, and in such a negligent manner as to throw the plaintiff off the car upon which he was at the time situated. Your investigation as to

neglect will be confined to these charges only because no others are alleged.

15 *e.* In determining the question as to whether the defendant furnished a sufficient car, you will take into consideration the kind of train the defendent was traveling upon, and the nature of his business and employment, if any, on that particular train, and if it was a freight train, the kind of freight which was being carried on the train. The defendant is not, as a carrier of passengers required to provide passenger cars on freight trains which are used only for transportation of freight, and if the plaintiff chose to go upon a freight train which had no passenger car attached or connected with it, when the defendant was providing passenger trains sufficient to carry him, and while on such freight train received a personal injury on account of his insecure position on such freight train, he can not complain of the failure of the defendant to furnish a different kind of a car.

16 *f.* In determining the question as to the negligence of defendant's servants in the management of the train of cars upon which it is alleged the plaintiff was a passenger, you will consider the kind of train they had and the kind of business they were doing, and the movements of the train at the time the alleged injury was done. The servant of the defendant in charge of a freight train would have the right to detach a caboose or any other car from the train and leave it at Mattoon or any other point and take on another, and for this purpose might move the train forward or back it from the main track on to side tracks, and if in so doing they used reasonable care in moving the train and backing it up to hitch on another car, the plaintiff can not complain.

17 *g.* If you find from the evidence the plaintiff was upon a freight car attached to a freight train at the time he received the injury complained of, you will, in determining the question as to the negligence of defendant's servants in the management of the train, take into consideration the kind of train and the means used in starting, and checking or stopping such trains. A freight train made up of several freight cars loaded with stock, can not be managed the same as a passenger train, and the defendant is not required to use the same degree of care in the movement of such trains, as is required in the movement of a passenger train, and such trains are not provided with the same means of stopping them.

5 *h.* A person standing on a freight or cattle train is bound to

exercise such care and take such precaution to avoid accident and injury to himself, as a person of ordinary care and prudence would take when exposed to the same danger, and under the same circumstances; and if the jury believe from the evidence that the failure to take such care and exercise such precaution contributed in any degree to produce or cause the injury alleged in the declaration, they will find for defendant. If the jury believe from the evidence that the plaintiff did any act which unnecessarily exposed him to the risk of the accident or injury of which he complains, he can not recover. Shearman & Redfield, § 281.

i. Travelers on railway trains are required to use reasonable care and precaution, while on a train or car, to avoid accident or injury, and it is no excuse for a passenger on a railroad car in taking a dangerous or insecure position on a car, that the conductor ordered or commanded him to take such position, if at the time he knew it to be insecure or dangerous.

j. If you find from the evidence that the plaintiff went on top of the cars to be carried from one point to another in the defendant's yards, while the train was being backed up to hitch on to another car, and that while the train was so moving the plaintiff stood on top of a car, and was by reason of his so standing up at the time of the movement of said train, thrown from the train and injured, when if he had been sitting down at the center of said car, he would not have been injured, then your finding should be for the defendant.

k. If you find from the evidence that plaintiff went on top of the cars in the night time, knowing at the time that the train was to be backed up to hitch on to a caboose, and that the train was heavy, and could only be moved by heavy steam, and would be backed up against the caboose, and that in moving the train there would necessarily be jarring and concussion by one car striking another, and that his injury was caused by such concussion and jarring of the cars, then he could not recover because he took the risk of the position.

l. If you find from the evidence that the plaintiff, in the night-time, when it was dark, went on top of the freight train, when the train was in motion, and stood upon the top of and near the end of a car when it was being backed up to hitch on to another car, and he might, instead of so standing up, have sat down at a less dangerous place, and the injury complained of resulted from a fall

from the end of a car, and the place where he stood was insecure, and he knew it was insecure, or might have known it by reasonable diligence on his part, then the plaintiff was guilty of neglect which contributed to his own injury, and your finding should be for the defendant.

19 *m.* If the plaintiff went upon the top of a freight car when the train was about to move, and stood up on top of such freight car near the front of the car, when it was being moved up to hitch on another car, and received an injury by falling from such car during the movement of the train, he was guilty of negligence and ought not to recover.

7 *n.* If the jury believe from the evidence that at the time the alleged injury occured, the plaintiff was riding on the top of a freight or cattle car, in the night time, when it was dark, and that there was a footboard on the top of such car, on which the plaintiff could have sat, and by holding to which he could have prevented himself from falling or being thrown from the car, and that plaintiff knew the cars were being backed up on a switch for the purpose of attaching a caboose, and that one effort to back such cars up to such caboose had failed; and that the engine had moved forward, and was about to make another effort to back the train up to the caboose; and that the plaintiff did not sit down, nor hold on to such foot board, but stood up near the end of such car; and that he took no precautions to prevent his falling or being thrown from the top of the car; and that a person of ordinary prudence in the same circumstances and exposed to the same danger, would have sat down, or held on to the foot-board, or stood further from the end of the car, or taken any other precautions to avoid falling or being thrown from the end of such car; and that such failure of plaintiff contributed in any degree to produce the injury, they will find for the defendant.

V. THE INSTRUCTIONS GIVEN.

The plaintiff asked the Court to give the following instructions *all of which were given as asked, without modification,* by the Court.

1. If the plaintiff has satisfied you by a preponderance of evidence that he was injured as claimed; and that the injury was caused by the negligence of those operating the

defendant's train of cars, then the plaintiff has made out his case and is entitled to a verdict, unless by his own want of reasonable care he contributed directly to the accident. *But the burden of proving contributory negligence of plaintiff rests upon the defendant, and it will not avail the defendant unless it has been established by a preponderance of the evidence.*

2. It would not be enough to defeat a recovery in a case like the present that the plaintiff's want of care might have contributed remotely to the injury, if the negligence of the defendant or her servants was the immediate cause of it, and if by the exercise of proper care or precaution the defendant might have prevented the injury. 2 Red. 91.

3. When carriers undertake to carry persons by the powerful but dangerous agent of steam, public policy and safety require that they be held to the *greatest possible care and diligence. If the defendant failed to exercise such a degree of care and diligence in the transportation of plaintiff*, and the want of the exercise of such care and diligence was the immediate cause of the injury he received, the plaintiff is entitled to recover, unless the plaintiff by want of reasonable care directly contributed to the injury.

4. It would make no difference in this case, that at the time the injury was received the plaintiff was traveling upon a ticket, on which there was printed a stipulation that by receiving and using it he agreed to exempt the company from any injury that might befall him by reason of the negligence of the defendant or her servants. The company had no right to require from the plaintiff any such agreement, and its enforcement against plaintiff would be contrary to public policy.

5. If you believe that a proper provision for the safety of drovers accompanying their cattle on a train requires that a caboose or car should be assigned to them, and that it would not be properly providing for their safety to *compel them to ride* on the deck of the cattle or freight cars comprising the train, you will have a right to consider—if such facts have been proved—whether or not it was a proper exercise of care on the part of defendant or her servants, on the occasion when the injury to plaintiff is shown to have occurred, to detach at midnight the caboose in which he was riding, from the remainder of the train for the purpose of attaching to the train a caboose at a point a half or three-quarters of a mile distant, and to require the defendant to climb on the deck of one of the cars to remain there till the train should be run to where the new caboose was to be attached, and if you should find that these facts have been proved, and that this was not a proper provision for plaintiff's safety, and that the injury was directly occasioned by such improper provisions for his safety, while the plaintiff was exercising reasonable care to avert danger, then you should find for the plaintiff.

6. If you should find for plaintiff you have a right in estimating the pecuniary compensation which you shall award him, to consider the effect of the injury upon the past and future of the injured limb; the bodily pain and suffering if any he has already borne, and which the evidence has shown he is likely to suffer in future as the direct result of the injury received through the negligent conduct of the defendant.

VI. ERRORS ASSIGNED.

1. The Court erred in refusing to charge the jury, as requested by defendant, that a person who takes passage on a cattle or freight train instead of a regular passenger train, assumes the increased inconvenience and risk of danger incident to travel on a freight train, managed by prudent and competent men, with reasonable care. See instructions *b* and *c*, refused by the court, *ante*, page 10.

2. The court erred in refusing to charge the jury, that, in determining the question of the negligence of the defendant's servants, they should take into consideration the kind of train they had; the business they were doing; the movements of the train at the time of the alleged injury, and the means used in starting and checking freight trains, as requested by defendant, in instructions *e*, *f* and *g*, refused by the Court. See *ante*, pages 10, 11.

3. The Court erred in charging the jury that a person who takes passage on a cattle or freight train, instead of a regular passenger train, in order to be along with his cattle, has a right to require of the railroad company the highest possible degree of care and diligence in his transportation, regardless of the increased risk, and the usual incidents and conduct of a freight train. See instructions No. 3 given by the Court, *ante*, page 13.

4. The Court erred in refusing to instruct the jury that their investigation of the neglect of the defendant should be confined to acts of negligence alleged in the declaration, as asked by defendant in instruction *d* refused by the Court. See *ante*, page 10.

5. The Court erred in permitting plaintiff to prove over defendant's objection the manner in which cabooses were changed at Mattoon a year after the accident, to show that the manner of changing cabooses at the time of the accident was negligent.

6. The Court erred in charging the jury in a case where plaintiff's evidence showed that his own negligence caused the injury, that "the burden of proving contributory negligence rests on the defendant, and *it will not avail the defendant unless it is proved by a preponderence of the evidence.*" See page 13, *ante*.

7. The Court erred in refusing to give instructions 5, 6, 13, 20, 12, 18, 19, 7, asked by defendant. See *ante*, page 12.

8. The Court erred in 4th and 5th instructions given to the jury, heretofore set out on page 13.

9. The Court erred in overruling the motion of defendant to request the jury to find specially upon particular questions of fact involved in the issues in the event they should find a general verdict. See Record, p. 21.

10. The Court erred in refusing to grant defendant's motion for new trial for the reasons therein set forth. See Record, p. 8.

ARGUMENT.

1. *The Court erred in instructing the jury that a person taking a cattle train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes.*

In order to know whether the defendant was guilty of

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In order to know whether the defendant was guilty of

negligence we must know what degree of diligence was demanded by the relation of the parties under the circumstances of the case. "The requirement of different degrees of care in different situations is too firmly fixed and settled in the law to be ignored or changed." *N. Y. Central R. R. Co. v. Lockwood, supra.* "The degree of care required in any case must have reference to the subject matter and must be such as a man of ordinary prudence and capacity may be expected to exercise under the same circumstances. In some cases this rule will require the highest degree of care, and in others much less." *Unger v. Forty-Second Street, &c., R. R. Co.*, 51 N. Y. 502. The same degree of care is not required of common carriers of passengers for hire under all circumstances. The degree of diligence required by law of carriers for hire by stage-coach, street cars, ferry boat, freight train and passenger train varies in each instance according to the means used. *Hegeman v. Western R. R. Corporation*, 13 N. Y. 9; *Unger v. 42d Street R. R. Co.*, Supra; *Lebanon v. East Boston Ferry Co.*, 11 Allen 315. In the last case it was held: "A common carrier of passengers contracts in law that the kind of conveyance he adopts shall be a reasonably safe and convenient mode of transportation for its kind. The modes of conveyance in use by passenger carriers both by land and water vary as the exigencies of the traffic and its remunerative character require and justify. To require all carriers to adopt alike expensive provisions for the safety of passengers, without reference to the nature of their employment or the amount of their business would be impracticable and absurd."

The law requires of Railroad Companies, "not the utmost care that can possibly be conceived, or the highest possible degree of skill, but they are required to use reasonable care, and to take the best precautions in practical use." *Ford v. the London & South-western Rwy. Co.*, 2 Fost. & Find. 830. It requires the highest degree of care consistent with the nature of the undertaking, and the extent of the business in which they are engaged. *Warren v. The Fitchburg R. R. Co.*, 8 Allen 230; *Simmons v. The New Bedford, Vineyard and Nantucket Company*, 97 Mass. 368. But this degreee of care, in its application, must have respect to the particular mode of travel or transportation offered. *Galena and Chicago Union Rwy. Co., v. Fay*, 26 Ill. 568; *Fuller v. Talbott*, 23 Ill. 357; *Pitt., Cin. and St. L. R. R. Co. v. Thompson*, 56 Ill. 168.

In *Dunn v. The Grand Trunk Railway Co.*, 58 Maine 187, it is held: "Undoubtedly a passenger taking a freight train takes it with the increased risk and diminution of comfort incident thereto, and if it is managed with the care requislte for such trains, it is all those who embark in it have a right to demand. We have said in *C. & G. Rwy. Co. v. Fay*, observes BREEZE J. in *Chicago, B. and Q. R. R. Co. v. Hazzard*, 26 Ill. 376, that a passenger takes all the risks incident to the mode of travel and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adopt the proper care, vigilance and skill to that particular means. For this, and this only, the defendant is responsible. Passengers can only expect such security as the mode of conveyance affords."

The case of *The Chicago, B. and B. Railway Co. v. Hazzard*, 26 Ill. 376, from which the above quotation is made with approval by the Supreme Court of Maine, was, after its decision by the Supreme Court of Illinois, dismissed by the plaintiff, and brought again in the Circuit Court of the United States, where it was tried before DAVIS and DRUMMOND JJ. Upon this trial the Court charged the jury substantially as Judge BREEZE had decided in the Supreme Court that: "A passenger taking the freight train accepts it and travels on it acquiescing in all the usual incidents and conduct of a freight train managed by prudent and competent men—no more, no less."—1 Bissell, 505.

According to the rule prescribed by this Court in this case, requiring the *highest possible degree* of care and diligence, in carrying persons on freight trains, even when they are carried solely for their own accommodation, upon their agreement to assume all risks, the railroad company would be responsible for all damages resulting from accidents which might have been avoided by the use of air brakes, or from the fact that the freight train was heavier, and therefore less easily controlled or checked than a light passenger train, or from the fact that the bell rope in use on passenger trains was not used on the freight train, even though the passenger "taking the freight" solely for his own accommodation, knew, at the time he agreed to assume all risks, that it was heavier and less easily controlled than the passenger train, and not provided with air brakes nor bell cord.

It is not the highest possible degree of care to transport a passenger on a car attached to a heavy freight train,

which cannot, by reason of its increased weight, be managed with so much ease as an ordinary passenger train, and is more liable to jars and concussions. The highest possible care requires passengers to be carried on passenger trains and not on freight trains. According to the instruction given in this case, a traveler who takes a freight train, instead of the passenger train, for his own accommodation, upon an express agreement not to hold the company liable for damages, can recover damages for an injury sustained by him *because the company carried him on a freight train*, and failed to use "the highest possible care" in the kind of a train which they provided.

The Court refused to instruct the jury that the rights of the parties were in any manner affected by the kind of train plaintiff selected, or the fact that he was permitted to ride on a freight train, but charged that defendant was "bound to use the highest possible care and diligence * * *in the transportation of plaintiff.*" This would certainly require him to be "*transported*" on a regular passenger train.

The highest possible care and diligence in the transportation of passengers would not only demand bell cords, air brakes, but steel rails instead of iron, and all other possible precautions and appliances known to human skill, for controlling and managing trains. All these, under the instructions of the Court, a person taking a cattle train instead of a passenger train, has a right to require, and if the railroad company does not provide them it becomes an insurer, except against acts of God and the public enemy.

2. *The Court erred in refusing to instruct the jury that their investigation as to the negligence of defendant should be confined to the charges alleged in the declaration.*

Not only were the jury instructed to hold the defendant liable for the highest possible care in transporting a person who took passage on a cattle train instead of a passenger train, without regard to the kind of train or the uses for which it was provided, or the means or manner in which it was operated, but *they were not even confined to negligent conduct and acts alleged in the declaration.* On the other hand the Court refused to charge the jury, as asked by defendants, that their investigation as to neglect should be confined to the charges alleged in the declaration. See instruction *d* [14], *supra*, p. 10.

The jury were thus instructed to find for plaintiff if the injury to him resulted from the failure to exercise the highest possible degree of care in his transportation, *although such failure was in particulars not alleged in the complaint.* See first instruction given by the Court, *supra*, p. 13, and instruction *d* [14] refused; *supra*, p. 10.

The verdict, thus, is not the decision of the jury, upon issues joined, that the injury to plaintiff resulted from the negligent conduct and acts alleged in the declaration and denied in the answer; but is rather their general conclusion, under the instructions, that the injury to the plaintiff, who was being carried on a freight or cattle train, was the result of the failure to exercise the highest possible degree of careand diligence in his transportation, without regard to the particular negligent acts alleged in the complaint.

It is clear enough that it would have been a higher pos-

sible degree of care and diligence in the transportation of plaintiff to have carried him on a through passenger train, in which event he would not have "*stepped off*" the top of a freight car. It is easy to see how, under the instructions, the verdict in this case does not necessarily depend upon the decision of the issues joined between the parties.

We submit that defendant had a right to a trial according to law of the issues joined, and that the question of its liability for damages should not have been left to depend upon the general conclusion of a jury that it it had not exercised the highest possible degree of care in his transportation, unrestrained by the pleadings.

3. *The Court erred in permitting the plaintiff to prove the manner of changing cabooses at Mattoon after the injury, to show the "wrongfulness of their (defendants') conduct" at the time of the accident.*

Not only was the jury charged that defendant was held to the highest possible degree of care and diligence, in the transportation of plaintiff, regardless of the kind of train he took, or the manner and means of operating it; not only did the Court refuse to charge the jury that their investigation of defendant's negligence should be confined to the matters alleged in the declaration, and instruct the jury that plaintiff was entitled to a verdict if the injury he received while riding on the top of defendant's cattle train in the night resulted from the failure of defendant to use the highest possible degree of care and diligence in his transportation; but the plaintiff was actually permitted to prove, over the objection of defendant, that when plaintiff

passed through Mattoon a year after the accident, the defendant had changed the manner of attaching the second caboose, in order to show, as the learned counsel claimed, "the previous wrongfulness of their [its] conduct." [See plaintiff's argument on motion for a new trial, p. 3.]

Plaintiff testified: "I traveled with stock over this road since I was hurt."

Question by plaintiff's counsel: "State whether, since 1870, the company in changing cabooses at Mattoon, do it in the same way as they did it before that time?" To this question the defendant's counsel objected, because the same was improper and irrelevant, and did not tend to show any negligence on the part of the defendant on the occasion when the plaintiff was injured. Which objection was overruled by the Court, and to which ruling defendant at the time, by counsel, excepted in proper form and manner.

Witness then answered: "They do not do as they did. They now change cabooses at the same point." See Record, p.

Such was the evidence upon which a jury who were not restricted in their investigations as to the defendant's negligence by the allegations of the pleadings, were asked to find that defendant had not used the highest possible degree of care and diligence in the transportation of plaintiff. Even to the Court, in the printed argument on motion for new trial, counsel for plaintiff gravely argued:

"But after he received the injury the defendants, as if conscious of the wrongfulness of their conduct in requir-

ing drovers, at midnight, when suddenly roused from sleep, to mount upon the the top of a train, and incur the risk of such injuries as befell plaintiff, changed their manner of attaching the second caboose by taking it on at the place where they detached the first."

The fact that they changed the manner of attaching cabooses was to be taken as a confession of their negligence at the time of the accident.

This was manifest error. "The habits of the company at other times had no legitimate bearing on the issue." See *Gahagan, Adm'r, v. Boston & Lowell R. R. Co.*, 1 Allen, 189.

The importance of this evidence, under the instruction of the Court requiring the highest possible degree of care in defendant, and not confining the jury to the allegations of negligence in the complaint, cannot be exaggerated.

4. *The evidence did not show any negligence of the defendant in the particulars mentioned in the complaint.*

It can not be questioned that the company had the right to change cabooses at Mattoon. This could only be done as it was done, by backing the train on the switch to attach the new caboose. The caboose was on the switch in *the same yard.* Besides the plaintiff knew the caboose would be changed at Mattoon just as it was done, and that he would be exposed to the inconvenience of walking from one caboose to the other in the same yard, unless he chose to risk his neck by riding back and forth on the top of the cars while the train was switching.

There is not a particle of evidence that the concussion was caused by the negligence of the company, and no pre-

sumption will be indulged in the utter absence of evidence. On the other hand, in the *Hazzard* case, 26 Ill., p. 376, BREEZE, J., says, "It is unimportant how many persons swear that an engine driver of competent skill can always regulate the exact amount of steam let on. He may put on just as much or just as little as he pleases if he has perfect control of the throttle-valve, but how much or how little he shall put on at a particular time can not be precisely estimated, even with such control of the valve. His duty is to put on enough. Jerking then is inevitable."

In this case both *Nuss* and *Parsley* swear that the first effort to back the train on the switch failed to reach the caboose, when "they had on about all the steam they could get;" and *Nuss* says, "*they were obliged to start the engine forward and back up again which caused a jar.*" This is the evidence introduced by plaintiff, and the only evidence on the question.

Instead of showing negligence of the defendant, it clearly appeared from plaintiff's evidence that

5. *The accident resulted from plaintiff's own negligence.*

The cases are numerous in *England* and the *United States* where a non-suit has been granted because of contributory negligence appearing in plaintiff's evidence, but in none of them is the negligence more gross or the evidence of it more manifest than in this case.

In *Gavett v. Manchester and Lawrence R. R. Co.*, 16 Gray 507 [1860], BIGELOW, CH. J., said: "It can not be doubted that the well-known hazards of transportation on railroads, and the unprotected and exposed situation of persons stand-

ing on the platform of the car, or attempting to leave it when the train is about to start, or is actually in motion, render it unsafe for passengers to place themselves in such a situation, and preclude the idea that due care can be exercised under such circumstances; and it was held that under such a state of facts the Court properly directed the jury to find a verdict for the defendant. In *Todd v. The Old Colony and Fall River Railroad Company*, 3 Allen 21 [1861], it was said; "Certainly, if it is want of due care to attempt to leave a car when the train is in motion, although going at a slow rate of speed, as has been heretofore determined by this Court, it is no less a want of proper care to ride in a car with an arm or a leg exposed to collision with passing trains, or the nccessary structures on the sides of the track. * * * In such a state of the evidence it is the duty of the Court to decide on its legal effect, and to say to the jury that the plaintiff had failed to make out his case." See also *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 231; *Bridges v. The North London Rwy. Co.*, 6 Law Rep. (2 B.) 384; *Sner v. G. W. Rwy. Co.*, 4 Law Rep. (Ex.) 117; *Adams v. L. & Y. Rwy. Co.*, 4 Law Rep. C. P. 742.

In *Penn. R. R. Co.* v. *Aspell*, 23 Penn. State, 149 [1854], BLACK, CH. J., it is said: "Railroad companies are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. * * * It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. * * A railroad company is not liable to

a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty. * * It is true that a person is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to avoid another. * * But did the plaintiff in the present case suffer the injury he complains of by trying to avoid another with which he was threatened? Certainly not. He was in no possible danger of anything worse than being carried on to a place where he did not choose to go. That might have been inconvenient, but to save himself from a mere inconvenience by an act which put his life in jeopardy was inexcusable rashness."

In the present case, plaintiff had frequently traveled over the road, sometimes on freight trains with his stock, and at other times on passenger trains, and knew cabooses, conductors and engines were changed at Mattoon just as they were changed at the time of the accident, and with this knowledge, he took a freight train instead of a passenger train, and when he arrived at Mattoon, instead of walking from one caboose to the other, he walked forward the length of the train, about 230 yards, climbed on top of the same, and walked back again on top of the cars, traveling thus a distance of a quarter of a mile, one half of it on the top of the car, in the night, at the risk of his neck. He did this without compulsion. He did not expose himself to this danger in trying to avoid another. He was in no possible danger of anything worse than having to walk to the other caboose in the same yard, or of being left at Mat-

toon. It is not the slightest excuse that the conductor told him to get on the car. He was not bound to put his life in peril because some one told him to. He stood up near the end of the car, when the train was in motion, without making any effort to ascertain his true position, although he had a long stick in his hand by which he could easily have done so; and although he heard the engineer "taking up the slack," and knew the shock was coming; but supposing he was on the same car with the brakeman, though he says "he might have known, if he had thought, that he was not," when the jar came, he "*stepped forward*" into the space between the cars and fell on the coupling. His own evidence showed that if he had held to the foot board, or stood further from the end of the car, or even taken the pains to find out how far he was from the end of the car, he would not have *stepped off*. See *ante*, page 9.

It would be difficult to state a case of more gross negligence.

6. Although plaintiff's evidence showed that the accident resulted from plaintiff's negligence, the Court charged that "*the burden of proving contributory negligence rests on defendant, and it will not avail the defendant unless it has been established by a preponderance of the evidence.*"

This, we respectfully submit, was clearly erroneous. When the fact of the plaintiff's contributory negligence appeared in plaintiff's evidence, there was no burden resting on the defendant to prove it, and it *would* "avail" equally as if it had "been established by a preponderance of the evidence" by defendant. Whatever may be the rule as to the burden of proof in cases where no negligence on the

part of plaintiff appears in the evidence introduced by him, it is the unanimous voice of the authorities that where the negligence of plaintiff appears in his own evidence, no burden of proving it rests on the defendant, and it defeats the action. Indeed, the great weight of authority seems to establish the doctrine that in cases like this the burden rests on the plaintiff to show that the injury resulted *solely* from the negligence of defendant.

In the *Hazzard* case, BREEZE J., said: "The books are full of cases where in such actions as this the burden of proof is always held to lie on the plaintiff that he himself was exercising ordinary care and diligence at the time the accident happened. *Butterfield v. Forester*, 11 East, 60, is a leading case on that point." 26 Ill. 376.

And in the same case when brought in the U. S. Circuit Court [1 Bissell, 105], DAVIS J., in his charge to the jury said: "*In order to maintain the action, the plaintiff must show* that the contract on the part of the defendant has been violated in consequence of some fault or negligence of its employes, or through some defect of the means of transit, and it must appear *that his own fault or negligence did not contribute to the injury.* * * * If a prudent man would not have been where and as plaintiff was at the time of the jerk, and for the purpose of alighting from the car, he cannot recover," etc.

In *Button v. Hudson River R. R. Co.*, 18 N. Y. 253, STRONG J. held: "Without proof of due care of plaintiff, it would not appear that the negligence of the defendant caused the injury. * * * "Ordinarily in such actions, where there has been no fault on the part of plaintiff, it will

sufficiently appear in showing the fault of the defendant, and that it was a cause of the injury; and when it does so no further evidence on the subject is necessary. The fact must appear in *some way*, but in what particular mode is unimportant. * * Whatever the nature of the evidence, if there is any conflict as to the fact, there must be a preponderance of proof in support of it, or the action must fail. * * In cases like the present it is often of great practical importance that the jury be properly instructed as to the burden of proof in respect to the care required of plaintiff to entitle him to recover. The party holding it must make more than a balanced case on that point."

In the recent case of *Mayo v. The Boston & Maine R. R. Co.*, 104 Mass. 140 [1870], WELLS, J., said: "It is well settled that in order to recover for an injury on the ground of negligence of another party, it must appear that the plaintiff was in the exercise of due care in respect to the occurrence from which the injury arose. * * The burden rests on the plaintiff to make this appear. Although in form a proposition to be established affirmatively, it is not necessary to be proved by affirmative testimony addressed directly to its support. The burden is held to be on the plaintiff for the reason that it is a subordinate proposition, necessarily involved in the more general one upon which the action is founded, to-wit: that the injury to plaintiff was caused by the negligent or wrongful conduct of the defendant. If this be shown by evidence which excludes fault on the part of the plaintiff, the proposition of due care is established as effectually as by affirmative testimony."

In *Johnson* v. *The Hudson River Railroad,* 20th N. Y. 60, DENIO, J., it was held, "The *Onus Probandi* is this, as in most other cases, depends upon the position of the affair as it stands on the undisputed facts. * * * The true rule in my opinion is this: The jury must eventually be satisfied that the plaintiff did not by any negligence of his own contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident. *To carry the case to the jury the evidence on the part of plaintiff must be such as if believed would authorize them to find that the injury was occasioned solely by the negligence of the defendant.*"

This Opinion is quoted with approval, [although cited erroneously] by HUNT, J., in the recent case of *Railroad Co.* v. *Gladden,* 15 Wallace, 407 [1872]: "While it is true the absence of reasonable care and caution on the part of one seeking to recover for an injury [caused by negligence] will prevent a recovery it is not correct to say it is incumbent on him to prove such care or caution * * If there are circumstances which convict him of concurring negligence the defendant must prove them and defeat the action." The Court further says, "Generally, as here, the proof which shows the defendant's negligence, shows also the negligence or caution of the plaintiff. The question of the burden of proof is not therefore usually presented with prominence," and quotes from and approves the decision of DENIO, J., in which it is held:

The "*Onus probandi* depends on the position of the affair as it stands on the undisputed facts," and "the evidence on the part of plaintiff must be such as if believed would

authorize them to find that the injury was occasioned *solely* by the negligence of defendant." This opinion of JUSTICE HUNT does not overthrow, but corroborates a rule of law long and well settled by decisions in England, Massachusetts, New York, Pennsylvania, Connecticut, Maine, Maryland, Michigan, Wisconsin, Iowa, Illinois and Indiana.

In this case, as we have seen, plaintiff's evidence was not such as would authorize the jury to find that the injury resulted *solely* from defendant's negligence, and therefore there was no case to go to the jury. To charge that the burden of proof rested on defendant where no evidence had been introduced by defendant, was in effect to charge that the proof of contributory negligence appearing in plaintiff's evidence "will not avail the defendant." It not only placed the burden where it did not belong, but in effect charged that plaintiff's own testimony as to his own negligence would "not avail the defendant," and should be disregarded by the jury.

7. *The Court refused the motion of defendant to instruct the jury to find specially upon particular questions of fact involved in the issues in the event they should find a general verdict.*

The correctness of this ruling depends upon the construction of the act of Congress of June 1, 1872. That act provides: "The practice, pleadings and forms and modes of proceeding, in other than equity and admiralty causes, in the Circuit and District Courts of the United States, SHALL CONFORM, AS NEAR AS MAY BE, to the practice, pleadings and forms of proceedings existing in like causes in

Courts of Record of the State in which said Circuit and District Courts are held."

CH. J. MARSHALL said, in *Osborn v. U. S. Bank*, 8 Wheat, 366, "Courts of themselves are mere instruments of the law * * and can will nothing, When they are said to exercise a discretion it is a mere legal discretion; a discretion to be exercised in discerning the course prescribed by law; and when that is discerned it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the legislature; or, in other words, the will of the law."

The words of a statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification. "The Court," said COLERIDGE, J., 6 A. & E., p. 7, "will not attempt to mould the language of an act for the sake of an apparent convenience, without the clearest evidence of a corresponding intention in the legislature." In another place the same learned judge observed: "If I thought the construction we are adopting put any force on the meaning of the act, I should be the last to concur in it; for the longer I sit here the more I feel the importance of seeking only the meaning of a statute according to a fair interpretation of the words, and acting upon that." Again: "It is, in my opinion, so important for the Court in construing modern statutes to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the oper-

ation of a section, which is within its words, but clear and unambiguous evidence that so to do is to fulfill the general intent of the statute, and also that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute." *Potter's Dwarris on Statutes*, p. 358.

There is no ambiguity in the words of this act. While it may be a question whether cases arising under the criminal law were intended to be embraced by the term "in other than equity and admiralty causes," it is not a question that arises in this case. It is clear that this phrase does embrace actions at common law; nor can there be any question that the words "practice, pleadings, and forms and modes of proceeding," embrace the form and mode of proceeding of returning a verdict and special findings. See Bouvier's Dic. *verb.* Practice. This act has been construed in the case of *Butler v. Young*, in the U. S. Circuit Court, W. D. Ohio [Dec., 1872], reported Chicago Legal News, vol. 5, p. 146, and in the case of *The Republic Ins. Co. v. Williams*, HOPKINS, J., Chicago Legal News, vol. 5, p. 97. In the former case it was said: "The various kinds of process, with the forms of journal entries, and *modes of proceeding in Court* must conform to the practice of the State Courts, and the State statutes and rules and decisions of the State Courts on these subjects must be the rule of decision and practice in the United States Courts." In the latter case Judge HOPKINS held: "That [act] abrogated all rules of this Court inconsistent with the State practice in common law cases and adopted the practice of the State Courts, and required the United States Circuit

and District Courts to conform to such practice in all cases where practicable. *No discretion is left to the Courts, except on the question as to how near it was possible to follow the State practice*, for the act certainly adopts it in all cases where it can be conformed to by the Courts."

According to the "practice, * * forms and modes of proceeding * * existing in like causes in the courts of record in the State" of Indiana, either party had the right to have the jury find specially upon particular questions of fact, involved in the issues, and to have such finding returned with and form a part of the verdict. When the general verdict is in conflict with the special findings, the latter must control. "In all cases, when required by either party, [the court] shall instruct them, if they under a general verdict to find specially upon particular questions of fact to be stated in writing. This special finding is to be recorded with the verdict." 2 G. & H. sec. 33 6, page 205; Sage *v.* Brown, 24 Ind. 469.

This is a right of the greatest importance in cases where the sympathy or prejudice of the jury would be likely to affect their judgments, such as cases brought against railroads for personal injuries in times of prevailing and organized popular prejudice against them. Indeed, if it was not for this rule of practice it would sometimes be difficult to distinguish the verdict of a jury from the resolution of a committee of grangers.

The Act says, "the practice * * and modes of proceeding in this Court shall conform *as near as may be* to the practice * * and forms of proceeding" in like causes in the State Courts. The only discretion left to the Court

was [in the language of J. HOPKINS] "how near it was possible to follow the State practice" in this respect.

Such special findings are not inconsistent with the common law doctrine that the jury is the judge of the facts, while the Court is to decide the law of the case. On the other hand, it is stated in Tidd's Practice, vol. II, p. 896 [4th Amer. Ed.], that since the Statute of Westm. 2 (13 Edw. I.) c. 30, § 2 [A. D. 1285], "It has become the practice for the jury, when they have any doubt as to the matter of law to find a special verdict, stating the facts, and referring the law arising thereon to the decision of the Courts." See also 3 Black. Com. 377, 378; special verdicts have thus been familiar to the common law for 600 years, and are well known in the practice of the U. S. Courts. See *Barnes* v. *Williams*, 11 Wheaton, 415 [1826]; *Prentice* v. *Zane's Admr.* 8 Howard 487; *Livingston Mar. Ins. Co.* 6 Cranch 280; *Peterson* v. *United States*, 2 Wash. C. C. 36; *Butler* v. *Hooper*, 1 Wash. C. C. Rep. 499; *Bellows* v. *Directors & Co. of Hallowell & Augusta Bank*, 2 Mason 31.

A special finding upon particular questions of fact, involved in the issues, to be returned with the general verdict, is only a modified and more convenient form of special verdict, and is certainly practicable in Courts where special verdicts are not unusual. There would have been no difficulty in conforming to the State practice in this case.

The only question which is left to the discretion of the Court—"as to how near it is possible to follow the State practice" [opinion of HOPKINS, J., *supra*]—does not remain

open. It was not only possible, but was justified by the common law practice of special verdicts, was eminently fit and proper in a suit for personal injury against a railroad company at a time when the class from whom juries are chiefly selected were not only greatly inflamed against railroads, but more or less engaged in an active warfare upon them.

8. *The damages were excessive.*

Plaintiff testified: "I couldn't get out till after the cattle were sold and settled for. I used crutches for *nearly six months*, and did no business of any consequence for a year or so. Did not go after stock for eleven months. When I wanted to go to my farm had to use a horse and buggy. It was difficult to get in. This injury affects me so that I have never been a day without pain. My foot is so tender that I can not walk on it easily or on *uneven surfaces, or when barefoot.* I have to wear a laced boot as a support; can only move my ankle or foot slightly. Have to use a cane in walking. *I paid Dr. Todd five dollars for services.* I was 50 years old on the 21st of last May." See record, p. —

The verdict was $8,000, and that, too, in a state where the damages recoverable in an action for an injury resulting in death are limited to $5,000.

9. *In conclusion.*

The motion for new trial should have been granted in the court below. Plaintiff's own evidence showed that the injury resulted from his own negligence, and not from that of defendant. The jury were instructed that they should

find for plaintiff if defendant failed to use the highest possible care in his transportation, although he took a freight train upon which he had often traveled before, and on which he knew the highest possible care could not be used. In determining the question of defendant's negligence the Court refused to confine the jury to the allegations of the declaration, and permitted proof that a year after the Company had changed the manner of attaching cabooses to freight trains at Mattoon, for the purpose of showing that defendant did not use the highest possible care at the time of the accident.

It appeared in plaintiff's own evidence that he had been guilty of gross and suicidal negligence in standing, in the night, on the top of a moving freight car, when he knew a jar was coming, without taking any pains to ascertain how far he stood from the edge of the car, and without even knowing which car he was on, though he says he might have known if he only thought; and when the jar came, having taken no thought to know where he was, and thinking he was on the same car with the brakeman, he "stepped forward" into the space between the two cars and fell. Yet, after this, the defendant having introduced no evidence, the jury was instructed that the *burden of proving contributory negligence rested on defendant*, and *it would avail the defendant nothing unless it was established by a preponderance of evidence.* Not only did the Court refuse to confine the jury to the allegations of the complaint in determining the question of negligence, but even refused to direct them to find specially upon the questions of fact involved in the issues, thus leaving the jury unre-

stricted by the allegations of the pleadings, in determining whether defendant had used the highest possible degree of care and diligence in carrying plaintiff on a freight train, and free to render a verdict of $8000, for an injury to the ankle by which plaintiff was compelled to pay five dollars surgeon's bill, to use crutches for *nearly* six months, and which left his foot tender, so that he could not easily walk barefoot or on uneven surfaces.

We respectfully ask a reversal.

JOHN. T. DYE,
A. C. HARRIS,
For Plaintiff in Error.

Wm A. Brown
of Grinnell

IN THE SUPREME COURT

OF THE UNITED STATES.

THE INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY, *Plaintiff in Error*,

v.

HENRY HORST, *Defendant in Error.*

ARGUMENT FOR DEFENDANT IN ERROR.

Indianapolis Printing and Publishing House.

IN THE SUPREME COURT

OF THE UNITED STATES.

THE INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY, *Plaintiff in Error,*

v.

HENRY HORST, *Defendant in Error.*

ARGUMENT FOR DEFENDANT IN ERROR.

The pleadings in this case consisted of the complaint, containing two paragraphs; of the answer thereto, consisting of a general denial, and of several special paragraphs; of a reply, by a general denial to the averments contained in the fourth paragraph of the answer, which alleged generally that the injury complained of was caused by the plain-

tiff's own negligence; and of demurrers, which were sustained, to the other special paragraphs of the answer.

The complaint is copied in the brief of the plaintiff in error, and also the fifth (erroneously called in the brief the fourth) paragraph of the answer, to which it is stated a demurrer was sustained; but the ruling of the court upon the demurrer is not assigned for error. No question, therefore, arises upon the pleadings.

The charge given by the court to the jury will be found on pp. 26–28 of the printed record, and the instructions asked by the defendant and refused by the court will be found on pp. 23–26 of that record. In the brief on behalf of the plaintiff in error, in which counsel profess to set out the charge of the court, the introductory part of the charge, in which the issues are stated, has been, by oversight, omitted, and the instructions refused, which they profess to set out, are not in fact all set out, nor are those which are copied into their brief copied in the order in which they appear in the record. In referring to the instructions given by the court, as likewise to those refused, we shall, for accuracy, refer to them as they appear in the printed record.

THE CASE PROVED.

The facts of the case, as disclosed by the evidence, may be stated succinctly as follows:

The plaintiff was a farmer, residing in Pennsylvania, who had likewise been engaged, since 1862, in the cattle trade, shipping annually about a thousand head of cattle over western railroads to eastern markets. The injury

complained of was received on the fourth of August, 1870. He had shipped on the day before, by the defendant's road, five car loads of cattle, to be transported to Pittsburgh, and was on the train with them at the time of the injury. He left Saint Louis about three o'clock in the afternoon, and arrived at Mattoon, Ill., about midnight of the following day. He and his fellow drovers, two in number, were carried to that point in a caboose attached to the hinder end of the train. They were asleep on the arrival of the train there, and were roused by the conductor, who commanded them to get out of the caboose and to get upon the top of the train, saying that he was going to detach the caboose and go some distance farther up the road where he would hitch on another. The plaintiff had with him a carpet-sack and a cattle prod. He handed his carpet-sack to one of his fellow drovers to take care of until he could go forward, the train being at rest, to look after his cattle, and returned on the roof of the cars, while it was still at rest, to the place where his fellow passengers were standing awaiting the movement of the train. There he again received his carpet-sack, and standing upon the top of the car held the satchel in one hand and used his prod in the other, the better to support himself. The train then ran up a half or three-quarters of a mile to pass into a switch and take on another caboose. A brakeman was standing on the hindmost car with a lantern in his hand when the plaintiff took his position. The light of the lantern so dazzled or blinded him that he thought he was on the same car with the brakeman, though he was in fact near the rear end of the car next before it. The

train, in backing on the switch, having stopped before it reached the caboose which was to be attached to it, was suddenly drawn forward, to "take up the slack," and then as suddenly backed, producing a quick and powerful concussion, which threw the plaintiff forward and precipitated him between the car on which he was standing and the hindmost car. "The shock of the concussion," says the witness Parsley, "was about as hard a shock as I ever felt not to knock a train off the track. It seemed as if it was tearing everything to pieces." The plaintiff fell on the coupling and received an injury which has rendered him lame for life, and largely unfitted him for a successful conduct of his occupations.

No warning was given to the plaintiff or his fellow passengers that these sudden and dangerous movements were likely to occur.

No warning was given to them that any precautions were required.

They were not furnished with a lantern to light them, though the train hands had such for their guidance and safety.

There was on the top of the car on which the plaintiff stood a narrow board which ran longitudinally with the car, meant for the train hands to walk upon in walking to and fro while on duty. It is said by the defendant's counsel that a person sitting upon this might have clung to it and thus have better secured his safety. But the plaintiff was not told that it was there, or to hold to it, or that he could hold to it if he desired. It was not put there to sit upon.

If he had sat upon it he would have been in the way of the train hands, for it was a walk for them. Besides, as a traveler and drover, he had his satchel and prod, which he could only take care of by holding them in his hands.

The plaintiff had before traveled upon this road, and had been required, in like manner, to change to the top of the train, but the concussion of the cars never before having been so violent in attaching the second caboose, he had, by good fortune, escaped injury; but after he received the injury the defendants, as if conscious of the previous carelessness of their conduct in requiring drovers, at midnight, and when suddenly roused from sleep, to mount upon the top of a train and incur the risk of such injuries as befell the plaintiff, changed their manner of attaching the second caboose by taking it on at the place where they detached the first.

The practice of the defendant is shown to have been to carry drovers on the same train with their stock. When the stock of the plaintiff and his fellow drovers was put on the train the company's agent said: "Now, gentlemen, come and get your passes," which they did. A ticket called a pass, similar, as the evidence tended to show, to the one given to the plaintiff, was admitted in evidence and is copied in the brief of the plaintiff in error (p. 6).

THE PLAINTIFF A PASSENGER FOR HIRE.

That the plaintiff was a passenger for hire, notwithstanding he was traveling on this pass, is altogether clear. Artfully worded as the instrument is, a valuable consideration for it is disclosed. It begins, "Pass Henry Horst *on ac-*

count of stock;" and it then adds that the plaintiff "releases the company from all responsibility of loss or damage to his stock by suffocation, trampling, or injury to each other while in transportation." In other words, the defendant granted the plaintiff personal transportation over its road in consideration of the profit to be derived from carrying his cattle, and in consideration of the fact that, by his accompanying his stock, he saved the company the expense of employing servants to keep the stock on foot while in transit and to give other requisite attention, and from the liability to damages which might ensue from the negligence of such servants in not taking proper care of the stock. The consideration rendered by the shipper by giving his personal attention to stock would in ordinary cases exceed the cost of transporting him on the train. It would not be like the case of one traveling on a freight train with dead freight, requiring no care and attention and relieving the company from no responsibility.

The practice also being universal among railroad companies to carry drovers along with their cattle when they will consent to go, it is not at all certain that the cost of carrying them does not enter as an element in fixing the price charged for the transportation of the stock.

In the light of the decision in the *N. Y. Central Railroad Co. v. Lockwood*, 17 Wall. 357, we cannot perceive how a doubt can exist that the plaintiff was a passenger for hire. The facts showing that he occupied that relation were much stronger than in *Lockwood's* case. The plaintiff in that case was a drover, injured while traveling on a stock train. He had cattle on the train, and had been re-

quired at Buffalo to sign an agreement to attend to the loading, transporting and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, etc. He received a "drover's pass," certifying that he had sufficient stock to pass *free* to Albany, and the agreement stated its consideration, viz., the consideration for releasing the company from liability for negligence, to be *the carrying of his cattle at less than tariff rates.* He was, nevertheless, held to have been a passenger for hire.

It was not regarded in the Lockwood case a question for the jury whether the plaintiff was a gratuitous passenger or a passenger for hire. The court, construing the ticket, held him to be a passenger for hire. Yet the ticket did not indicate that relation with the clearness that the ticket held by the plaintiff in the present case does.

It being clear that the plaintiff was a passenger for hire, what degree of diligence was required from the defendant in transporting him on the train?

DILIGENCE.

The case of the *Philadelphia and Reading Railroad Company v. Derby*, 14 How. 486, was one in which the plaintiff sued to recover damages for an injury received while being carried over that company's road. He was a gratuitous passenger, president of another railroad company, and a stockholder in the company sued, and he was not in the usual passenger cars when he received the injury, but in a small locomotive car used for the convenience of the officers of the road. In that case, Mr. Justice GRIER, in delivering the opinion of the court, said: "When carriers

undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held *to the greatest possible care and diligence.* And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passenger should not be left to the sport of chance or the negligence of careless agents."

In the subsequent case of the *Steamboat New World* v. *King*, 16 How. 469, which was also the case of a free passenger, carried on a steamboat and injured by the explosion of a boiler, Mr. Justice CURTIS, delivering the opinion of the court, quoted the words of Mr. Justice GRIER, above given, and said: "We desire to reaffirm that doctrine as resting not only on *public policy*, but on *sound principles of law.*"

In Lockwood's case, *supra*, this court refers to both these cases with approbation, and adds, "In regard to passengers the highest degree of care and diligence is expressly exacted."

In the case in hand the instruction in respect to the degree of care required in carrying the plaintiff, was in the very words of Mr. Justice GRIER. It would seem, therefore, that the propriety of the instruction could not now be open to debate.

But the learned counsel for the defendant argue that as the defendant was transporting the plaintiff upon a cattle-train, it should not be held to as high a degree of care as if he had been upon a train appropriated exclusively for the transportation of passengers. But *Lockwood* was a

passenger in a cattle-train. This court, also, in the case in 16 Howard, *supra*, seem to us to have plainly disposed of the question. When a railroad company *undertakes* to transport passengers for hire, by whatever sort of carriage, it must be held to engage to make every provision in its power for the safety of their persons. To require a passenger to ride upon the roof of a car, in the dead of night, while the sudden and dangerous movements incident to taking on new cars are being made, is indeed to leave him to the "sport of chance." Knowing, in the case of the plaintiff, that his baggage and prod must be in his hand—no other place having been provided—to furnish him no light, to give him no warning of the danger to be apprehended from sudden and violent movements of the train, was indeed "to leave him to the negligence of careless agents." Instead of this, the highest possible care and diligence ought to have been taken to avert injury. To lower the standard of care and diligence on the part of railroad companies in the transportation of passengers is to invite railroad disasters; to keep it exalted is to secure alike the safety of passengers and the best ultimate interests of the roads themselves.

The counsel for the defendant, after arguing that too high a standard of diligence for the protection of human life was established by the court's instruction, proceed to affirm that "the evidence did not show any negligence of the defendant in the particulars mentioned in the complaint." They say, (page 25):

"It cannot be questioned that the company had the right to change cabooses at Mattoon. This could only be

done as it was done by backing the train on the switch to attach the new caboose. The caboose was on the switch in the same yard. Besides, the plaintiff knew the caboose would be changed at Mattoon just as it was done, and that he would be exposed to the inconvenience of walking from one caboose to the other in the same yard, unless he chose to risk his neck by riding back and forth on the top of the cars while the train was switching."

The counsel here admit that the plaintiff in riding "back and forth upon the top of the cars," did so at "the risk of his neck." The defendant had no right to subject him to that risk.

But they say he "chose" to take the risk rather than to be exposed to the inconvenience of walking from one caboose to the other in the same yard. There was not a particle of evidence to support this statement. The plaintiff was commanded to get upon the top of the train. He did not know where the other caboose was. He was not told where it was. It seemed to have been a half to three quarters of a mile distant. There was no offer to conduct him or his fellow drovers to it. If he did not obey the command to get upon the train he doubtless thought he would be left by it and his cattle deprived of care and protection during the remainder of the journey.

But counsel say that "the court erred in refusing to instruct the jury that the investigation as to the negligence of the defendant should be confined to the charges alleged in the declaration."

We have referred to the fact that in copying into their

brief the instructions given, the counsel have by oversight omitted the introductory part of the learned judge's charge, in which the issues were specifically stated. Doubtless this assignment is made in forgetfulness of the fact that the issues were thus recited.

In this connection complaint is made of the refusal by the court of the fourteenth instruction asked by the plaintiff in error. That instruction professes to state the issues, but does not state them correctly, and then asks the court to charge the jury that their investigations as to neglect will be confined to those charges only. It is well settled that if a prayer for instructions be not correct in its very terms, it is not error to refuse it. 1 Bright. Dig. 340, s. 317. But the court having preceded its instructions by a statement of the issues, there could be no ground for complaint had the instruction refused been correct.

It is said, too, that "the evidence did not show any negligence of the defendant in the particulars mentioned in the complaint." It showed that the defendant was on the top of a car, at midnight, without the benefit of a light; that no precaution had been given him that any violent movement of the train or concussion was to be expected; that at the instant before the plaintiff was precipitated from the car the train was suddenly "pulled up to catch the slack," and that then "the train came back with all the power it had," and the witness Parsley says, "It was about as hard a shock as I ever felt not to knock a train off the track. It seemed like it was tearing everything to pieces." Transcript, pp. 10–11. If such a movement, where human life was thus exposed, was not negligent in the opinion of

this railroad company, it would be interesting to learn from it what in its estimation would be negligence in the transportation of passengers.

The declaration, after stating the position of the plaintiff, &c., added that "while being so carried and conveyed on the roof of one of the cattle cars, by and through the carelessness and negligence and improper conduct of the defendant's servants in that behalf, and without fault of the plaintiff, said train was run or backed with great violence against some car or other obstruction to the plaintiff unknown, and in consequence of the concussion, and from the insecure position which the plaintiff occupied by reason of having been compelled to be so carried and conveyed on the roof of one of the cars belonging to the said train, the plaintiff was suddenly precipitated," &c. It is difficult to perceive, in the light of these averments, why "the evidence" above recited did not show any negligence of the defendant in the particulars mentioned in the complaint.

BURDEN OF PROOF CONCERNING CONTRIBUTORY NEGLIGENCE.

Objection is made to the instruction given respecting the burden of proof as to contributory negligence. The court, after informing the jury that the plaintiff could not recover if by his own want of reasonable care he contributed directly to the injury, instructed them in substance that it was not incumbent upon him to show affirmatively that want of such care on his part did not contribute directly to the injury, but that the burden of proving contributory negligence rested upon the defendant. This instruction

conforms to the decision in *The Railroad Company* v. *Gladmon*, 15 Wall. 401. It conforms also to the rule as laid down by Mr. Wharton in his learned work on Negligence. Whart. on Neg. § 423.

It is said that this instruction was erroneous, because the evidence offered by the plaintiff himself showed that he was chargeable with contributory negligence. If that were even true, the instruction was right as showing upon whom the burden of the issue rested. But in the light of the evidence, which was all one way, it is hard to treat this statement seriously. The plaintiff was ordered at midnight out of the caboose in which he had been riding; he was told to get on top of a car as this caboose was to be detached and another to be taken on at a long distance off; his business was to go with the train to keep charge of his cattle; if he did not obey the command given to him he was liable to be left by the train and exposed to the risk of robbery. Yet his conduct in getting on top of the car under these circumstances is likened to the case of a passenger who wilfully stands on the platform of a car while the train is in motion, or attempts to leap from a moving train. One would think that a railroad company was hard pressed that institutes such a comparison.

It is contended that the court erred in permitting the plaintiff to prove the manner of changing cabooses at Mattoon after the injury. The change consisted in taking on the new caboose at the point at which the old one was detached, instead of running after the latter was detached about three-quarters of a mile up the road and backing into a switch to attach it. The brief of the learned counsel (p.

25) states that the thing could only have been done as it was done. The evidence admitted shows that after the plaintiff received the injury complained of, it was done in another and much safer manner. The evidence of the change thus made also tended to show that the company regarded the new method as the safer one.

A case has recently been decided in Indiana, which is quite in point. A suit was brought against a railroad company to recover the value of a cow injured by a locomotive of the company at a place on its road where it was alleged the road could have been but was not fenced. The company claimed that it could not legally have fenced the road at that point. On the trial of the cause the plaintiff was allowed to prove that the company was then repairing or had lately repaired or replaced parts of a fence that had been there. The Supreme Court, on appeal, held that "the evidence was properly admitted, to show that the company regarded the place as one where it might legally erect a fence." *Toledo, &c., R. R. Co.* v. *Owen*, 43 Ind. 405.

The evidence of the alteration made in the manner of changing cabooses, so far as it tended to show that the old method was unsafe, in requiring passengers to ride at least a mile on the top of the cars before switching, and to remain thereon in the dead of night, without a light, while the process of attaching a new caboose was going on, was really unimportant. The other testimony adduced by the plaintiff of the perilousness of the situation of passengers riding on the top of a car in the circumstances under which the plaintiff rode, was clear and overwhelming, and was

not met by any opposing evidence on the part of the defendant. Indeed, no evidence was offered on the part of the defendant, on any point in the case, except the evidence of one of its attorneys, and that was in relation to the kind of passes furnished to drovers.

INTERROGATORIES TO THE JURY.

It is argued that a new trial should have been granted on account of the court's refusing the defendant's motion "to instruct the jury to find specially upon particular questions of fact involved in the issue, in the event they should find a general verdict."

The section of the Indiana code is cited in their brief which requires the court, in all cases, when requested by either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact to be stated in writing. 2 G. & H. 205, sec. 336.

The section of an act of Congress is also cited which, in respect to the practice, pleadings and forms of proceeding, in other than equity and admiralty causes, requires conformity, as near as may be, in the circuit and district courts of the United States, to the practice, pleadings and forms of proceeding existing at the time in like causes in the courts of record of the State.

Mr. Phillips, in his work on the Practice in the United States Courts, (p. 214, second ed.,) has called in question the constitutionality of this section. He says:

"By this section the proceedings in a common-law cause are to conform to the proceedings 'existing at the time' in like causes in the 'courts of record of the State.' The

time here mentioned seems to refer to the period when the cause is being tried. * * The acts heretofore passed on this subject legislated by the adoption of modes of proceedings existing at the time of the enactment and known to Congress. They also defined the court whose proceedings were so adopted. Thus the act of 1828, providing for States admitted into the Union since 1789, adopts modes of proceeding in each of said States, respectively, 'as are now used in the highest court of original and general jurisdiction of the same.' Here we have a definite designation as to time, and a specific description of the court whose proceedings are to be followed. In the new act we have neither. Congress is intrusted with the power to create the circuit and district courts. Is not the delegation to the States of a power to control their proceedings, the abdication of a duty which the constitution confers upon the Congress itself?"

But, dismissing from further consideration the question whether the section under review is liable to constitutional objections, the inquiry arises whether, supposing it to be valid, it requires the application of the section of the Indiana code above cited to the system of procedure in the Federal Courts. That it does not is we think sufficiently shown in the opinion of Mr. Justice SWAYNE, in *Nudd* v. *Burrows*, 91 U. S. Reports (1 Otto), p. 441.

The provision that in all cases, when requested by either party, the court shall instruct the jury "to find specially upon particular questions of fact to be stated in writing," had no place in our code until the legislature abolished the distinction between actions at law and suits in equity, and

the forms of such actions. To render practical an enforcement of equitable remedies through the trial by jury, it became necessary to provide some means for ascertaining in particular cases the facts found by the jury, in order that the court might conform its decree to the facts found, and ascertain the import of the general verdict with respect to the remedy proper to be administered. The feigned issues in equity having no longer a place in our practice, yet, equitable remedies being still to be administered, the provision in question had, we have no doubt, regard to this fact, and was meant to supply a convenient means of attaining the result formerly reached by the feigned issues. If this view is correct, is a Circuit Court, while not even allowed to adopt this particular mode of proceeding in equity cases, nevertheless, obliged to apply it in the very class of cases which, had they existed alone, no such statute would ever have been adopted? Convenient as the section is when employed for the purposes contemplated by its framers, it can be made, and it has often been made, in practice, a mere agency for worrying juries, and of producing a disagreement when they were unanimous in respect to what their verdict ought to be, and in respect to the substantive facts that would support it.

We believe that the refusal to submit the interrogatories to the jury was correct.

But if, for the sake of argument, we were to admit that it is incumbent upon the court to submit, if required by either party, interrogatories requiring a unanimous re-

sponse from the jury in respect to each particular fact in the case, however minute or trivial, what harm was done to the defendant by the refusal to submit the questions presented by the defendant? The questions are nine in number, and in respect to the evidence applicable to eight of them there was no conflict. For the purposes of the present motion we could safely concede that the answers would have been such as the questions were designed to elicit:—that (1) the plaintiff was riding in the night on the top of a cattle car, and that the night was dark; (2) that there was a foot-board on the top of the car, on which (had he known it was there) he could have sat down, and (though it was not made to hold on to, and the plaintiff would have been obstructing a walk laid for the train hands while on duty) to which he could have held on (by throwing away his carpet-sack and prod) and prevented himself from falling from the cars; (3) that he did know at the time of the injury that the train of cars on which he was riding was about to be backed up on the switch for the purpose of attaching a caboose; (4) that he did not sit down on the foot-board, or hold on to the same; (5) that (having been blinded by the brakeman's lantern, and not knowing his position), he stood upon the car within six feet, or thereabout, of the end of it; (6) that (being ignorant of danger and not having been warned that any was to be apprehended) he took no precautions to avoid or to prevent his falling from the car (but stood upon the deck supported by his feet and his prod); (7) that (by the command of the conductor) he got upon the top of said cattle car when he knew the train was about to move (and

would leave him if he did not do so); and (8) that the injuries alleged in the complaint resulted from his falling or being thrown from such car while standing on the top thereof.

The ninth interrogatory was clearly one which the court did right in refusing.

It did not state in writing a "particular question of fact" for the jury "to find specially upon." It did not point to any particular fact and ask whether or not it was established.

POINTS OF PRACTICE.

We have discused the questions sought to be raised on the refusal of certain instructions asked by the railroad company as if exceptions to the refusal of such instructions had been properly reserved. We should, however, be guilty of injustice to the learned judge who presided at the trial did we not refer more specifically to the instructions thus refused.

The Indiana statute in relation to new trials prescribes the causes for which a motion for a new trial will lie. 2 G. & H. 211, s. 352. Among these causes is "error of law occurring at the trial and excepted to by the party making the application." The application for a new trial must be by motion upon written cause, filed at the time of making the motion. *Id.* p. 215, s. 356. The "written cause" is designed to inform the court and opposing counsel of the particular grounds upon which the motion will be urged. In the case under consideration the counsel for the railroad company presented to the court twenty instructions, with a request that they should be given to the

jury. They were very lengthy and, as this court will perceive at a glance, most of them were wholly inapplicable to the case as presented by the evidence. In moving for a new trial the cause assigned, so far as related to a refusal of instructions, was that the court erred "in refusing to give and charge the jury the written instructions and charges asked by the defendant, numbered No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20," etc. The attention of the court was no more particularly called to the instructions which it is now claimed were improperly refused than to the many others the refusal of which was so obviously proper that the denial of them is not in this court argued to have been erroneous. A motion like this becomes in effect a mere blind, under cover of which a supposed error may escape the observation of the judge. It seems to us that a practice by which a judge might be thus entrapped, under a statute intended to make clear to him the grounds upon which he is desired to review his rulings, ought to encounter the reprehension of this court. See 47 Ind., p. 343; 91 U. S. Rep., p. 648.

THE DAMAGES.

We conclude by referring to the last point assigned for error, that the damages are excessive.

It seems to us that the damages assessed by the jury were moderate. The evidence of the surgeon was that the plaintiff's ankle is so badly injured that he can use it but little; that certain of the bones are a half-inch farther apart than they ought to be; that no treatment can make the ankle better; that fractures of a joint are always worse than the fracture of a simple bone; and that the plaintiff in

respect of locomotion is in nearly as bad a condition as if he had a wooden leg. The plaintiff's evidence is that he suffered great pain from the injury when received, and that since he received it he has never been a day without pain; that his business has been seriously interrupted by it; and that his foot is so tender he can not walk on it easily over uneven surfaces, and has to wear a laced boot to support the ankle. The sum given by the jury is indeed a meager indemnity for such an injury.

We believe there is no legal reason why the judgment of the Circuit Court ought not to be affirmed.

A. G. PORTER,
W. P. FISHBACK,
G. T. PORTER,
For Deft. in Error.

Queens 149
142 Jane
Toto 648
55 N-4-250
12 Queens St

3-302

Martin
v
Hazard Powder
Co.

This is a motion
and not among the
Records